CODES OF CONDUCT FOR TNCs AND INTERNATIONAL LAW:

AN OVERVIEW

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MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled "**CODES OF CONDUCT FOR TNCs AND INTERNATIONAL LAW: AN OVERVIEW**" submitted by me for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my original work. This dissertation has not been previously published or submitted for any other degree of this University or any other University.

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Victims

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ABBREVIATIONS

AALCC	Asian African Legal Council Committee
ATCA	Alien Tort Claim Act
ATS	Alien Tort Statute
BIAC	Business and Investment Advisory Committee
BITs	Bilateral Investment Treaties
CIME	Committee on Investment Multilateral Enterprises
CSR	Corporate Social Responsibility
EAMSA	Emilio A. Maffezini S.A.
ECOSOC	Economic and Social Council
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
GDP	Grass Domestic Product
ICC	International Criminal Court
ICHR	International Committee of Human Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
ILO	International Labour Organisation
ILP	International Legal Personality
IPRs	Intellectual Property Rights
MIAs	Multilateral Investment Agreements
NCPs	National Contact Points
NGOs	Non-Governmental Organisations
OECD	Organization of European Cooperation and Development
RICO	Racketeer Influenced and Corrupt Organization Act

SLORC	State Law and order Restoration Council
SODIGA	*Sociedad para el Desarrollo Industrial de Galicia*
TCC	Transnational Capitalist Class
TMC	Transnational Middle Class
TNCs	Transnational Corporations
TOC	Transnational Oppressed Class
TRIPs	Trade Related Aspects of Intellectual Property Rights
TUAC	Trade Union Advisory Committee
UCC	Union Carbide Corporation
UCIL	Union Carbide India Limited
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTC	United Nations Centre for Transnational Corporations
UNGA	United Nations General Assembly
UNGC	United Nation Global Compact
WTO	World Trade Organisation

CHAPTER 1

INTRODUCTION

CHAPTER I

INTRODUCTION

1.1 Background

Transnational Corporations (TNCs) are at the forefront of the global economy in the age of globalisation. Of the largest 100 economies of the world, 51 are corporations. The combined sales of the top 200 corporations in the world are bigger than the combined economies of all countries except of the 10 biggest economies. The combined sales of these top 200 corporations is eighteen times the size of the combined annual income of 24 percent (1.2 billion) of the world's population living in abject poverty.[1] According to one other estimate, made by Indian Economic Outlook, 70% of world trade, 80% of foreign investment, and 30% of global GDP is controlled by the World's 500 largest companies.[2] Exxon Mobil, Royal Douch Shell, British Petroleum, and Chevron are among the most profitable TNCs of the world. In addition to global 500 corporations, other important i.e. private and smaller corporations are also significant for global capitalism.

The impact of economic development through TNCs is not the same in developed and developing countries. TNCs are profit motive business entities often at the cost of welfare of the common people. TNCs have been involved in human rights violations and causing environmental degradation and pollution especially those engaged in the exploitation of natural resources i.e. oil, natural gas, gold, diamonds, etc. In a sense the strategy of TNCs is largely the same today as it was in the colonial period. The profitability of these entities is based on control over sources of raw materials and the availability of cheap and exploitable labour in the host country. The problem of ecological crisis is also connected with the culture of consumerism purveyed by TNCs, encapsulated in the political and ideological struggles over the

[1]Oshionebo, Evaristus (2009), *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study,* London: University of Toronto Press, p. 5.

[2]Indian Economic Outlook (2003-04), *Challenges for Indian Multinational*', p. 6. (http://vpmthane.org/pub_mnc/A%20Brief%20on%20MNCs%20inside%20pages.pdf).

concepts of sustainable development and development itself.[3]

In recent decades, there has been a tremendous change in the regulatory context that shapes the social and environmental performance of business enterprises particularly in context of TNCs. For the countries who invited to FDI or other forms of TNC participation including in their development process, the challenge is to regulate the entry and operations of TNCs in a way that maximizes development gains.[4] At present TNCs are regulated through domestic law and international instruments such as codes of conduct, norms and guidelines in conjunction with the new concept of Corporate Social Responsibility (CSR). But there is yet no binding legal instrument, which can make TNCs direct accountable for violating human rights, environmental pollution (norm) and such other problems.

1.2. Definition

The UN Draft Code of Conduct for TNCs defines the term 'Transnational Corporation' as an enterprise as a whole or its various entities.[5] The nature of these entities are mentioned as enterprises which operate under a system of decision making, permitting coherent policies and a common strategy through one or more decision making centre, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and in particular, to share knowledge, resources and responsibilities with the others. TNC's can be private, public or mixed. The nature of legal form and fields of activity of these entities are immaterial for the regulation. The UN Draft does not define the term 'code of conduct'. It only says that:

> "a universally accepted, comprehensive and effective code of conduct on transnational corporations is an essential element in the strengthening of international economic and social-cooperation and...to maximize the contributions of transnational corporations to

[3]Sklair, Leslie (2001), *The Transnational Capitalist Class*, Oxford: Blackwell publishing, p. 6.

[4]United Nations Conference on Trade and Development (2007), *World Investment Report 2007: Transition Corporations, Extractive Industries and Development*, Switzerland: United Nations Publication, p.159.

[5]Art. 1 (a) of *UN Draft Code of Conduct for Transnational Corporations*, (1990) U.N. Doc. E/1990/94.

economic development and growth and to minimize the negative effects of the activities of these corporations."[6]

For the purpose of this dissertation a 'code of conduct' here means all existing instruments which regulate the activity and behavior of TNCs. It includes codes of conduct, norms and guidelines, corporate codes of conduct, guidelines under MIAs/BITs, domestic law, awards of international as well as national court and tribunal. Before observing the nature of these instruments it is necessary to understand the nature and development of TNCs.

1.3 Importance of TNCs

Life-conditioning social structures, as Chimni evaluated "are today shaped by global capitalism amidst an accelerated globalization process, and the relevant public is accordingly constituted of different transnational groups and classes, including the Transnational Capitalist Class (TCC), Transnational Oppressed Class (TOC), and the Transnational Middle Classes (TMC)."[7] The process of globalisation influences the interest of these groups differently. Some are in better position while others are in worse condition. TCC can be divided into four crucial fractions: TNCs executives and their local affiliates (*corporate fraction*); globalizing state and inter-state bureaucrats and politicians (*state fraction*); globalizing professionals (*technical fraction*); and merchants and media (*consumerist fraction*).[8] The concept of the globalization process has changed the nature of corporation from multinational to transnational[9]or global

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[6]Ibid., Preamble.

[7]B.S. Chimni (2010), "Prolegomena to a Class Approach to International Law", *The European Journal of International Law,* Vol. 21, No 1, pp.57-82, p. 68. William I. Robinson and Jerry Harris define class as a group of people who share a common relationship to the process of social production and reproduction, constituted relationally on the basis of social power struggles. Robinson, William I. and Harris, Jerry (2000), "Towards A Global Ruling Class? Globalization and the Transnational Capitalist Class", *Science & Society*, Vol. 64, No. 1, pp. 11–54, p.17.

[8]Sklair, Leslie (2002), *Globalization: Capitalism and its Alternatives,* Oxford: Oxford University Press, p. 99.

[9] Robinson, William I. and Harris, Jerry (2000), "Towards A Global Ruling Class? Globalization and the Transnational Capitalist Class", *Science and Society*, Vol. 64, No. 1, pp. 11-54, p. 16, define '*Trans*national' as economic and related social, political, and cultural processes — including class

corporations. The corporation socializes its executives into a global worldview as a result of persuading them of the necessity for a corporate global strategy. Christian Palloix has suggested three kind of flow of capital as: first the circuit of *commodity capital* to become internationalized in the form of world trade, second the circuit of *money capital* in the form of the flow of portfolio investment capital into overseas ventures, and recently circuit of *productive capital* in the form of the massive growth of TNCs in the post–World War II period.[10] This transnationalization of production has expanded dramatically since 1970s, involving not merely the spread of TNCs activities, but the restructuring, fragmentation, and worldwide decentralization of the production process.

TNCs are the dominant institutional force in the global economy and a driving force for TCC. There are some other institutions which strengthen the TCC and the process of globalisation. Leslie Sklair focused on three main institutional complexes characteristic of the global capitalist system: TNCs, TCC and the culture-ideology of consumerism. He observed, "TNCs and consumerism have made such a quantitative and qualitative change in the contemporary world that its description would be fundamentally incomplete without due recognition of the place of the corporation and consumerism."[11] A key indicator of the rise of the TCC and its agents is spread of TNCs. In 1990, when the UN agency began to report on TNCs, there were 35,000 with 150,000 foreign affiliates. The total stock of Foreign Direct Investment (FDI), at that time, stood at some $1.7 trillion with annual flows of $225 billion. In 1995, according to the UNCTAD (1996), there were some 40,000 companies and two-thirds of world trade was carried out by TNCs. In 2008, according to UNCTAD, there were an estimated 82,000 TNCs with 810,000 foreign affiliates.[12]

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formation -that supersede nation-states. The global economy is bringing shifts in the process of social production worldwide and therefore reorganizing world-class structure. The globalization of production provides the basis for the transnationalization of classes and the rise of a TCC.

[10]Ibid., p. 19.

[11]Sklair, Leslie (2001) supra note 3, p. ix.

[12]United Nations Conference on Trade and Development (2009), *World Investment Report 2009, Transnational Corporations, Agricultural Production and Development*, Switzerland: United Nations Publication, p. xxi.

The World Investment Report (2007) clearly indicated that FDI, through TNCs, soared by a massive 38 percent in 2006 and reach US$1.306 billion.[13] TNCs accounted for 84 per cent of FDI with almost half originating from European Union countries, notably France, Spain and UK. The total stock of FDI, in 2008, stood at some $16.2 trillion, with annual outflows of nearly $2 trillion. This report also mentioned that "Employment in foreign affiliates of TNCs has increased nearly threefold since 1990...governments continue to adopt measures to facilitate FDI. In 2006 147 policy changes making host-country environments more favourable to FDI were observed."[14] Similarly, the share of world GDP controlled by TNCs grew from 17% in the mid-1960s to 24% in 1984 and almost 33% in 1995.

This kind of financial power allows TNCs a considerable degree of leverage over developing host countries. TNCs often use this power and influence to prevail over them to relax their domestic regulation.[15] The point of this analysis is to show how the TNCs provide the material basis for the existence and power of the TCC. Jason Struna pointed out that above analysis rejects the argument of those people 'who do not accept the idea of the globalization of the economy and says that TNCs remain domestic or national companies largely oriented to their home countries and largely constrained by home country rules and regulations.'[16] Without a coordinated global economy dominated by the major globalizing TNCs, it would be impossible for a TCC to exist. In this context four propositions on the TCC can be introduced.

> "First proposition that TCC, based on the TNCs, is emerging in the process of globalization. Second the TCC is beginning to act as a transnational dominant class in some sphere. Though capitalism operates globally but within the global capitalist system some actors are more powerful than others. Third the globalization of the capitalist system reproduces itself through the profit-driven culture of consumerism. This means that capitalist wants people to buy the goods and services which are

[13]United Nations Conference on Trade and Development (2007), supra note 4, p. xv.

[14]Ibid., p. xvi.

[15]Oshionebo, Evaristus (2009), Supra note 1, p. 6.

[16]Struna, Jason (2009), "Toward a Theory of Global Proletarian Fractions", *Prospective of Global development and Technology*, Vol. 8, pp. 230-260, p. 244.

produced by them. Fourth the global capitalist system working for single objective that is to maximize private profit. This notion creates two central crises, namely (i) The class polarization crises and (ii) The ecological crises that is un-sustainability of the system."[17]

The TCC has made effective use of expanding human rights law. The discourse on human rights is used to entrench the global property rights regime. The ideologues of TCC, as Chimni observed, "have also deploy human rights discourse to destabilize the foundational principles of international law, viz., the principles of non-use of force, sovereignty, and non-intervention which offer protection to subaltern states and peoples."[18] They also expanded the idea of Corporate Social Responsibility (CSR) for legitimization of corporate led development. This concept links corporate activity related to community's rights such as human rights, labour rights and environmental issues.

1.4 Corporate Social Responsibility

Corporate Social Responsibility (CSR) is relatively new concern of the business community. It may be defined as "the idea that corporation have an obligation to constituent groups in society other than stockholders and beyond that prescribed by law or union contract." CSR covers the range of economic, legal, ethical, and discretionary actions that affect the economic performance of the firm. CSR, therefore, is complying with the legal or regulatory requirements faced in day to day operations. So violation of these requirements is tantamount to breaking the law, which is not being socially responsible. Compliance with the law is an important component of any business organization but legal compliance is merely a minimum condition of CSR. With regard to the ethical basis of why firms assume social responsibilities, there are two alternative principles:

1. Firms don't have any social responsibility beyond maximising shareholder

[17]Sklair, Leslie (2001), supra note 3, p. 5. The class polarization crisis is creation of increasing poverty and increasing wealth within and between communities and societies simultaneously.

[18]Chimni, B.S. (2010), supra note 7, p. 73.

value. So the social responsibility of business is to increase profits.[19]

2. Firms do have such social responsibilities and should act accordingly. Essentially, CSR recognise that corporations are not only responsible to their shareholders, but owe, or should owe, particular duties to persons or communities directly or indirectly affected by their operations; such persons or communities comprise a corporation's stakeholders.[20]

Second approach is more relevant in context of social responsibility and every corporate entities tries to show they are responsive towards society. There are some other similar terms as corporate social performance, stakeholder management, corporate citizenship, business virtue, business ethics, or corporate sustainability. All concepts emphasized that corporate decision makers should consider the moral consequences of their decisions.[21] CSR should be framed in such a way that the entire ranges of business responsibility are embraced. Carroll suggested that CSR includes four kinds of responsibility: economic (*make profit*), legal (*obey the law*), ethical (*be ethical*) and philanthropic (*be a good corporate citizen*).[22]

Traditionally business organizations were created as economic entities intended to provide goods and services to societal members. The profit motive was established as the primary incentive for entrepreneurship. Business organization is

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[19]Friedman, M. (1970), "The Social Responsibility of Business Is to Increase Its Profits", *The New York Times Magazine*, Paris, France, p.3.

[20]Freeman, R.E. (1984), "Stakeholder Theory of the Modern Corporation", *General Issues in Business Ethics,* pp.38-48, p. 42, originally written by Freeman, R E. and Reed, D. (1983), "Stockholders and Stakeholders: A New Perspective on Corporate Governance," in C. Huizinga ed., *Corporate Governance: A definitive Exploration of the Issues,* Los Angeles: UCLA Extension Press, 1983. Freeman proposed two kinds of definition of Stakeholder. The "narrow definition" includes those groups who are vital to the survival and success of the corporation. The broader definition includes any group or individual who can affect or is affected by the achievement of the firm's objective.

[21]Carroll, A. B. and Shabana, Kareem M. (2010), "The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice", *International Journal of Management Reviews,* pp. 85-105, p.86.

[22]Carroll, A. B. (1991), "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders," *Business Horizons*, No 34, pp. 39–48, p. 41.

basically the economic unit in our society. Its principal role is to produce goods and services to consumers and to make an acceptable profit in the process. Economic responsibility is the basic responsibility of these entities. All other business responsibilities are predicated upon the economic responsibility of the firm, because without it the others become moot considerations.[23] In the legal regime these responsibilities are regulated by domestic company law. Economic responsibility may be named as corporate duty because corporate law constitutes economic consideration in term of rights and duty of corporation.

It is true the economic responsibility of corporation is primary but it is one and only responsibility it is unaccepted. Society does not give permission business organisation to operate only according to the profit motive. Business is expected to comply with the laws and regulations promulgate by state and local governments as the ground rules under which business must operate.[24] As a partial fulfilment of the "social contract" between business and society business entity are expected to pursue their economic missions within the framework of the law.

On the international plane, legal responsibilities reflect a view of "codified ethics." It means that they embody basic notions of fair operations as established by the international community. They are appropriately seen as coexisting with economic responsibilities as fundamental precepts of the free enterprise system. The term 'legal accountability' is also used in place of legal responsibility but former has some distinction with later.[25]Carroll also described two other responsibility ethical and philanthropic responsibilities. He explains:

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[23]Ibid., p. 41.

[24]Ibid., p. 42. There are two kind of legal responsibilities: (1) responsibility to follow the law, and (2) responsibility which emphasizes deliberation with preparedness to give good reasons for one's actions in terms that admit for generalization. In other words first kind of responsibility refers to observe the law per se, and second kind of responsibility refers to the spirit of law—i.e., approaching law through socially appropriate considerations. Geva, Aviva (2008), "Three Models of Corporate Social Responsibility: Interrelationships between Theory, Research, and Practice", *Business and Society Review*, Volume 113, Issue 1, pp. 1–41, p. 25.

[25]Brent Fisse and John Braithwaite have suggested four solutions to the problem of disharmony between law and corporate culture. (a) making legal principles of responsibility conform to corporate

"philanthropic responsibilities as those activities and practices that are expected by societal members even though they are not codified into law where as ethical responsibilities cover those standards, norms, or expectations that reflect a concern for what consumers, employees, shareholders, and the community regard as fair, just, or in keeping with the respect or protection of stakeholders' moral rights".[26]

A corporation's legal responsibility is to follow the law that legislatures and other division's of the government use to protect employees, stakeholders, customers, suppliers and other regulatory laws that could include protecting the community whereas social responsibility can be defined as anything that goes beyond economic and legal responsibility. In idea of CSR corporations accept social responsibilities in order to meet society's expectations. In context of CSR, meta-regulation might be one of the ways in which the theory and practice of law must be transformed and reconceptualised in order to interact with other elements of governance.[27] In other words as Sabel explained "meta-regulatory law recognise and empower initiatives developed by non-state actors or partnerships of actors that can regulate corporate governance processes." A meta-regulatory approach to law recognises some governance mechanisms that might not have traditionally thought of, as law could in, an extended sense and evaluated according to criteria of legality. Meta-regulatory law is a response to the recognition that law itself is regulated by non-legal regulation, and should therefore seek to adapt itself to plural forms of regulation.

CSR requires responsibility towards society or stakeholders. Sometimes the term 'accountability' is used as synonyms of responsibility. There is a difference between corporate responsibility and corporate accountability. Corporate responsibility refers

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principles of accountability; (b) making corporate decision making conform to legal principles of responsibility; (c) making corporate and legal principles of responsibility conform to some ethical canon; or (d) allowing corporations to propose their own principles of responsibility as the basis for a pluralist matching of legal principles and organisational cultures. Fisse, Brent and Braithwaite, John (1993), *Corporations, Crime, and Accountability*, New York: Cambridge University Press, p. 123.

[26]Carroll, A. B. (1991), supra note 22, p. 43.

[27]Sabel, C. and Simon W. (2006), "Epilogue: Accountability without Sovereignty", in G. de Búrca and J. Scott (eds.) (2006), *New Governance and Constitutionalism in Europe and the US,* Oxford: Hart Publishing, p. 14

to recognition by TNCs of their role in sustainable development, as well as the voluntary and self regulatory efforts they adopt. Corporate accountability implies legal obligations by corporations to promote sustainable development and to provide compensation when such obligations are breached.[28] Philip Selznick said responsibility goes beyond accountability to ask 'whether and how much you care about your duties. An ethic of responsibility calls for reflection and understanding, not mechanical or bare conformity. It looks to ideals as well as obligations, values as well as rules... Responsibility internalizes standards by building them into the self conceptions motivations, and habits of individuals and into the organization's premises and routines'.[29] In order to instigate, catalyse and hold accountable corporate social responsibility, law would have to be aimed at 'regulating' the internal self-regulation.

TNCs are powerful entities and they have capacity to influence the individual, local community, society and state. They can misuse their power and exploit the society. There are many examples of tyrannical activities of TNCs. Bhopal Gas Tragedy (UCC Case), Coca-Cola in Plachimada in Kerala are crucial example of TNCs exploitation in Indian contest. Big business corporations are alleged to concentred economic and political power contrary to public interest. These entities dehumanise workers and consumers and degrade the environment and the quality of life.

1.5 Sources of International Legal Regulation of TNCs

There are many hard and soft laws which provide right as well as duty related directly or indirectly with TNCs. The most important instruments that apply also to TNCs despite the fact they are addressed to states are as follows:

- Universal Declaration of Human Rights, 1948
- The Convention on the Prevention and Punishment of the Crime of Genocide, 1948

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[28]Clapp, Jennifer (2005), "Global Environmental Governance for Corporate Responsibility and Accountability", *Global Environmental Politics,* pp. 23-34, p. 27.

[29]Selznick Philip (2002), *The Communitarian Persuasion*, Washington, DC: Woodrow Wilson Center Press, p. 101.

- The International Convention on the Elimination of all forms of Racial Discrimination, 1965
- The International Covenant on Economic, Social and Cultural Rights, 1966
- The International Covenant on Civil and Political Rights, 1966
- Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1966
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- UN Draft Code of Conduct on Translational Corporations, 1990
- United Nations Global Compact, 2000
- The Convention against Corruption, 2003
- UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, 2003.

1.6 Research Methodology

To understand the subject matter the study shall be mixture of both doctrinal and non-doctrinal method and basically analytical in nature. The research work would be mainly based on primary and secondary sources of economic law, human rights law and other related areas. The primary sources include various international conventions, legislative guides and legal principles which have been adopted by international and regional institutions. The secondary sources will include books, journals and internet sources.

1.7 Objective, Scope and Chapterisation

Against this background, the aim of present study is to attempt an analysis of the nature of TNC and to their regulation through the meaning of "Codes of Conduct." It will try to develop mechanisms so that corporate power can be regulated more effectively. As the title of this study suggests the main purpose of present dissertation is to provide an analysis of codes of conduct to regulate the TNCs that exist at international level. It will examine whether the existing voluntary and non binding codes are sufficient to regulate TNCs.

The dissertation is divided into four further chapters.

Chapter 2 will deal with basic principles and conceptions of international legal personality in order to clarify the status of TNCs in international law. This chapter will seek to address the question whether TNCs should be recognised as legal person under international law.

Chapter 3 will critically evaluate existing codes of conduct to regulate TNCs. These codes are prepared by different international organisations like United Nations and their agencies International Labour Organisation (ILO), UN Human Right Council etc, and regional organisations i.e. Organisation of Economic Cooperation and Development (OECD). The study will try to evaluate whether these codes are sufficient to regulate and control the activity of TNCs and makes provision for proper remedy to victim exploited by these powerful entities.

Chapter 4 is exclusively devoted to the analysing disputes arise between the TNCs and states, individual and local community and the emerging jurisprudence developed by the arbitration, international and domestic tribunals.

Chapter 5 contains conclusion and summarise the major findings of the present study within the broad framework of issues analyzed and end with suitable suggestions.

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CHAPTER 2

STATUS OF TNCs IN INTERNATIONAL LAW

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2.1 Concept of International Legal Personality

The concept of International Legal Personality is an essential means for assessing an entity in international life. International legal issues are related to the concept of legal personality, including the determination of international rights and duties of non-state actors and the legal capacities of transnational institutions. Possessing International Legal Personality (ILP) means that an entity exists and is recognized as having a separate legal identity. The concept of ILP is an attempt to improve our understanding about international legal process. International Court of Justice pronounced an authoritative statement on international personality is the well-known definition articulated by the in the *Reparation for Injuries* opinion:

> "An international person . . . is . . . capable of possessing international rights and duties, and . . . has capacity to maintain its rights by bringing international claims..."[1]

The concept of ILP could serve as a basis for inquiring into the fundamental aspects of international law in the era of globlisation with TNCs as central actors. The term 'Personality' has a positive connotation at the present time: if someone or something has 'personality' it is appreciated for having a separate and distinctive identity. In its opinion, the court seemed to take a relatively open approach to ILP, which is especially interesting in the light of the contemporary transformation of international life. A connection is made between the doctrine of ILP (subject of law) and the requirements of international life itself:

> The subjects of law in any legal system are not necessarily identical in their nature or the extent or their rights, and their nature depends upon the needs of the community. Through its history, the development of international law has been influenced by the requirement

[1] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), ICJ Reports (1949) 174, p. 179.

of international life..."[2]

Examining what ILP meant and why it was used in the theory of international law in the past could contribute our understanding of the concept of ILP today. ILP is closely associated with statehood and compliance with norms and obligations of international law, especially in human rights. Statehood still appears to be the best political structure for international law to rely on for the implementation of its rules and the accomplishment of the goals of its institutions. The discipline of international law contributes to the rethinking of the international society and its legal system to provide alternatives for our collective future. Although the primary function of international law remains that of regulating the relations of states with one another, contemporary international law has become increasingly concerned with international institutions and other non-state entities. According to Friedmann:

> "perhaps the most important of the revolution in the dimension of modern international law lies in its steadily expending scope, in the addition of new subjects to the field of international law. This expansion is due in large measure to the growing number of fields in which all or part of the family of nations co-operate for purposes of international welfare.[3]

In the transformation of international law two views related to the relevance of the concept of international personality may be mentioned.

1. The term ILP has often been avoided in legal doctrine. A group of scholars such as 'Rosalyn Higgins' prefer to speak of 'actors' or 'participants' rather than international persons.[4]
2. It has to be admitted that concept of international personality is only rarely directly addressed in international practice.

'Legal personality' as a legal system has to determine whom it endows with the

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[2] Ibid., p. 178, Here '*International Life*' refers to the life of the international society: its nature, the changes it undergoes, the relationships that exist within it and the members who participate in it.

[3] Friedmann, W. (1964), '*The Changing Structure of International Law*' New York: Columbia University Press, p.67.

[4] Higgins, Rosalyn (1994), *Problems and Process: International Law and How we Use it*, Oxford: Clarendon Press, p. 50.

rights and duties and whose actions takes into account by attaching legal consequences to them. In international law, it also has to be determined which entities have rights and duties and act in a legally relevant way. The notion of legal personality is similar in both municipal as well as international law. However, two peculiarities distinguish personality in international law from that in municipal law:

1. ILP not only denotes the quality of having rights and duties as well as certain capacities under the law but it also includes the competency to create the law. International law, contrary to municipal law, is thought to emanate from the will of state in the first place; the states composing the international system enact international law themselves through different modes of explicit and implicit coordination.
2. The second peculiarity is that there is no centralized law of persons in international legal system. There is neither a pertinent treaty nor are there established rules of customary international law that comprehensively determine matters of personality.

The meaning of ILP was tried to define by the ICJ in the *Reparation for Injuries Case*. Unfortunately, the definition is not very helpful because it neither addresses which entities are international persons nor does it state a comprehensive criteria according to which personality is to be attributed. ILP in international law therefore tends to be a relatively philosophical and theoretical topic[5]. It is a concept closely related to the nature and purpose of international law in general.

2.2 Different Conceptions

The concept ILP identifies and recognizes the entity which influenced the global community. Five different conceptions on ILP can be identified in the international legal literature:

1. The Statist Conception
2. The Recognition Conception
3. The Individual Conception
4. The Formal Conception and
5. The Actor Conception

[5] Brownlie, I. (2008), *Principles of Public International Law*, Oxford: Oxford University Press, p. 57.

2.2.1 The Statist Conception

The statist conception the personal scope of international law to relations between states exclusively: Only states are recognizes as ILP. This conception was expanded by Heinrich Triepel, L. Openheim and Dionisio Anzilotti. This conception was originated mainly in German socio-political and legal contexts that reduced international law to relations among states. This conception was never seriously challenged and was widely adopted in international law doctrine afterwards. This statist conception was defined in the well-known *Lotus dictum*[6] on international law governing relations between independent states.

In this conception only states are international legal persons. Statehood and international personality are regarded as synonymous. Oppenheim observed:

> "The statist conception of international persons is derived from the conception of the Law of Nations. This law is based on the body of rules which the civilized states consider legally binding in their intercourse. Every civilized state, a member of the family of nation, is an international person. Sovereign states exclusively are international persons - i.e. subjects of international law."[7]

The international system is regarded as a community consisting of states. A state's participation depends on recognition by the existing members in international community. International law is a law emanating from the will of the states constituting the international community. This conception is applicable only to states because they are the only components of the international system and there is no superior entity above state. Individuals and such other entities recognise as person by a domestic legal system,

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[6] *S. S. Lotus case,* (1927*), The Government of the French Republic vs. The Government of the Turkish Republic*), September, (1927), PCIJ series A, No -10, p. 18. In this Case the whole dictum reads as: International law governs relations between Independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by Usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existence independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

[7] Oppenheim, L. (1905), *International Law: a Treatise*, London: Longmans, Green and Co., p. 99.

are not part of the international community.

2.2.2 The Recognition Conception

The recognition conception is a modified form of the statist conception. This conception accepts the primacy of the state in international law; but it also accepts that states can recognize other entities as international persons. This conception acknowledged through the works of Karl Strupp, Arrigo Cavglieri and George Schwarzenberger. They emphasized what they perceived as state practice regarding personality. This conception has been widely accepted because it represents the dominant conception of ILP today.[8] Most important legal manifestation of this conception is clearly mentioned in the *Reparation for Injuries* case of the ICJ dealing with the personality of the United Nations. The creation of international organizations, direct role of individuals in investment law treaties and such other legal issues may be regarded as manifestations of this conception. According to this approach:

> "States are the normal persons in international law but are free to recognize other entities as international legal person. The most important subjects of international law are sovereign states...nonetheless; it is a mistake to deduce from this state of affairs that sovereign states alone are eligible to be subject of international law. This is a matter within the discretion of each of the existing subjects of international law. States which are members of an international institution may agree to treat such international institution as a subject of international law for limited purposes. Non-members, however, may choose completely to ignore the existence of an International institution, as happened in the case of the League of Nations....every state is free to grant or to refuge to grant such recognition. It follows that a certain entity may have international personality in relation to one or several existing subjects of international law. But may lack such status in relation to others...there is no inherent impossibility in granting international personality to individuals.[9]

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[8] Hermann, M. (2004), "Subjects of International Law", *Encyclopedia of Public International Law*, No. 4, 710-27, p. 717-18.

[9] Schwarzenberger, G. (1960), *Manual of International Law*, London: Stevens and sons, p. 25,2,35.

This conception follows that ILP is acquired through recognition by states. This holds true for new states and also for non-state entities. Regarding new states, they first have to be recognized as an international person before being able to act in international law. In recognition of non-state entities as international persons, the mode of recognition cannot be a unilateral act. In this situation recognition has to be exercised by at least two states, one of them being the home state of these entities.

The recognition conception of international personality is based on three main propositions:

> "(1) A state, as a matter of historical fact, is the highest authorities in international relations. Individuals and such other entities are represented by their home state in the international realm. (2) International law can only emanate from state will and is only binding on those states having consented to it. In their function as international legislators states can recognize, at their full discretion, the entities taking part in the international legal system. (3) There is a presumption that only states are international persons. However, states can overcome this presumption by creating and recognizing non-state entities as limited international persons."[10]

The third proposition in the recognition conception is related to the sociological approaches formulated by Jellinek, Huber and Romano.[11] These approaches were understood in their context as a corrective measure in case legal deductions distanced law too far from social reality. The recognition conception is mostly used when dealing with entities that effectively play a role in international relations like the UN, the ICRC or TNCs. As these entities are not states and therefore not international persons as such they have to be admitted by states to the international legal system.

2.2.3 The Individualistic Conception

The individualistic conception of ILP emphasizes that according to fundamental legal principles the individual human being is an international person and has certain basic international rights and duties. The conception as presented here was articulated by

[10] Portmann R. (2010), *Legal Personality in International Law*, Cambridge: Cambridge University Press, p. 84.

[11] Ibid., p. 95.

Hersch Lauterpacht.[12] He was one of the principal advocates of an individualistic conception of ILP in the 20th century. Some other scholars are Georges Scelle, Hugo Krabbe, James F. Brierly, Nicolas Politis, Maurice Bourgin and Alejendro Alvarez. The status of individual as a subject of international law exists as a *priori*. It does not depend on explicit or implicit expression of State will. The individualistic approach argues that states do not exist in reality and therefore only individuals can be international person. It was his theory that was most influential in subsequent legal practice, particularly in international criminal law and human rights law.[13]

Hersch Lauterpacht in individualistic conception of ILP mentioned that individual human being is the ultimate international person and is capable of holding international rights and being subjected to international duties. He tried to encapsulate the different line of reasoning into one coherent theory:

> "There is no rule of international law which precludes individuals and bodies other than States from acquiring directly rights under customary or conventional international law and, to that extent, becoming subjects of the Law of Nations...The conferment of such rights may cover either particular rights or the so-called fundamental rights of the individual in general. With regard to the latter, there is room for the view that having regard to the inherent purposes of international law, of which the individual is the ultimate unit, he is in that capacity a subject of international law...Similar considerations apply to the question of subjects of duties imposed by international law...there has been an increasing realization that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law ..."[14]

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[12] Lauterpacht, Hersch (1975), 'The Subjects of the Law of Nations' in Elihu lauterpacht (edi.), *International Law: being the collected papers of Hersch Lauterpacht* Cambridge: Cambridge University Press, 487–533, p. 520–1.

[13] Portmann, R. (2010), *Legal Personality in International Law*, Cambridge: Cambridge University Press, p. 128.

[14] Lauterpacht, Hersch (1975), supra note 12, p. 526-27.

The individualistic conception rejected the positivist doctrine (in other words former two conceptions) of international personality.[15] This has found resonance in practice in US courts. The court through the United States Alien Tort Claims Act (ATCA) had to deal with alleged violations of international law by private parties, including corporations. Individualistic conception of international personality has been applied several times by court in the context of corporations having allegedly violated international *jus cogens.*[16]

2.2.4 The Formal Conception

The international legal system is compositely open: any one being the addressee of an international norm (right, duty or capacity) is an international person. Consequently, ILP is an a *posteriori* concept. In principle, there are no direct legal consequences attached to being an international person. In particular, the capacity to create international law does not follow from personality. Hens Kelsen formulated the formal conception as part of his pure theory of law. Others supporter of this conception are Paul Guggenheim, D.P.O. Connell and perhaps most prominently, Julio A. Barber's. The la Grand and Avena decisions of the ICJ supported this conception.

Personality in international law is then not a precondition for holding international obligations or authorizations, but is the consequence of possessing them. Kelsen expressed his view as:

> "Personality in international law is essentially an open concept. There is no limits as to which entities can be international persons. There is, thus, no a *priori* presumption for a specific entity possessing ILP. The mechanism by which international personality is acquired by interrelating international norms: any entity on which the international legal system confers rights, duties or capacities is an international person."[17]

In fact, personality is not regarded as concept belonging to positive law, but belonging to the realm of legal doctrine and as such being without concrete legal

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[15] Lauterpacht, Hersch (1950), *International Law and Human Rights*, London: Stevens and Co., p. 6–9.

[16] *Doe I v. Unocal Corporation* (2002), US Court of Appeals, Ninth Circuit, 395 F.3d 932, p. 945–7.

[17] Kelsen, H. (2007), *General Theory of Law and State,* New Jersey:The Law book Exchange, Ltd., p. 342.

implication. An international person thus simply reflects the sum of legal norms addressing a certain entity. Consequently, it is a subject matter for every international norm to determine its addressees and as such its legal persons. Whenever the interpretation of an international norm leads to it addressing the conduct of a particular entity, this entity is an international person.

On a fundamental level, international norms, like all legal rules, also regulates the conduct of individual human being. According to the formal conception, as Kelsen explained, every international norm in the first place addresses individuals:

> "All law is a regulation of human behavior. The only social realities to which legal norms can refer are the relations between human beings. Hence, a legal obligation as well as a legal right cannot have for its contents any things but the behavior of human individuals. If, then, international law should not obligate and authorize individuals, the obligations and rights, stipulated by international law would have no contents at all and international law would not oblige or authorize anybody to do any things."[18]

States and other corporate bodies do become international persons when an international norm is directed towards an individual whose conduct is attributed to the corporate body as a matter of the pertinent legal system. The reasoning of *Amco v. Indonesia*[19] has to be considered a manifestation of the formal conception of international personality. By implication, the company may a *posteriori* be considered an international person. This approach is in accordance with the formal conception of international personality.

2.2.5 The Actor Conception

The actor conception of ILP is often associated with the work of Rosalyn Higgins. She principally followed the Myers S. McDougal and Harold D. Lasswell. They formulated a new approach 'Policy-Oriented Approach to International Law' after World War II.[20] This conception considered that all entities exercising effective power in the

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[18] Ibid., p. 342.

[19] *Amco Asia Corporation and others vs. The Republic of Indonesia* (1986), 1 ICSID Reports 509, para–44

[20] Higgins, Rosalyn, "Conceptual Thinking about the Individual in International Law" in Richard Falk et al.

international 'decision-making process' are international persons. This conception, as Higgins proffered, uses the term 'participant' or 'actor' in place of international personality. It does not mean that all participants are international persons because in principle the concept of ILP does not exist in this conception. However, there is often reference to the status of certain participants as 'subjects of international law' or international person. Functionally the notion of participants is used to the same end as the conception of the international personality, that is, to describe which social entities are relevant in international law.

Some aspects of the actor approach had already been accepted by Philip C. Jessup and Wolfgang M. Friedmann. Philip C. Jessup explained the approach:

> "There is . . . no occasion here to continue the debate as to whether under existing international law individuals are subjects of the law or only its 'destinataires' (Addressees). Those who will consider some of the observations here as *lex lata*, while others will deal with them as made de *lege ferenda*. It remains true . . . that it is 'obvious that international relations are not limited to relations between states'. The function of international law is to provide a legal basis for the orderly management of international relations. The traditional international law was keyed to the actualities of the past centuries in which international relations were inter-state relations. The actualities have changed; the law is changing."[21]

The actors in this international legal system are states, international organizations, non-governmental organizations, TNCs and private individuals. The traditional notion of personality is nevertheless used at times. It seems correct to say that the actor conception considers being participants in international person. The actor approach can thus be considered a qualified conception of ILP. Generally in other conception international legal order is considered a system of rules but in the actor conception process of authorizative decision making is considered a system of rules. Rosalyn Higgins explained

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(ed.) (1985), *International Law: A Contemporary Perspective*, Londan: westeraw press, p. 476–94, p. 478–9.

[21] Jessup, Philip C. (1947), "The Subjects of a Modern Law of Nations", *Michigan Law Review*, 45 (1947), 383–408, esp. p. 384.

this notion as:

> "[Traditional] views – and the reasoning on which they are based carry with them so many assumptions that, in disagreeing with them, it is hard to know where to begin. The most basic assumption, of course, is that international law – indeed, any legal system – is a set of rules. Yet ..... law can be seen rather as a process: a particularized form of decision-making process, distinguished from mere political decision-making by the significance of reference to the accumulated trends of past decisions, the emphasis on the authority of the persons making the decision...."[22]

McDougal also explain this conception as:

> "Operating within the global process of effective power is . . . a comprehensive process of authoritative decision, in the sense of a continuous flow of decisions made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of authority, with enough bases in power to secure consequential control, and by authorized procedures."[23]

The process of authoritative decision making has to be distinguished from the political process of naked power. The process of authoritative decision making is more pre-determined than a mere political process, but at the same time it is not confined to legal adjudication.[24] In 2002, the tribunal, by clear implication, declared the Bank for International Settlements (BIS) as an international person. The reasoning of the tribunal was based on the actor conception of international personality. In its award tribunal held:

> "....when applied to an actor which is an international entity, but is not a state, public interest must be understood, mutatis mutandis, as an action rationally, proportionately and necessarily related to the performance of one of the legitimate international public purposes of the actor undertaking it."[25]

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[22] Higgins, Rosalyn (1985), supra note 20, p. 478-9.

[23] McDougal Myers S. et. al (1980), *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, New Haven and London: Yale University Press, p. 162.

[24] McDougal Myers S. et. Al (1967), "The World Constitutive Process of Authoritative Decision", *Yale Law School Legal Scholarship Repository*, Vol. 19, No 13, pp. 253-300, p. 276.

[25] *Reineccius et al. vs. Bank for International Settlements* (2004), 43 ILM 893, para. 150.

It is submitted that on the basis of observation of different conception of international personality, it is difficult to advance arguments to recognise non-state actors as international person because historically international personality developed in relation to states. But in context of recent developments, especially with respect to international crimes and fundamental human rights, the conception of international personality must be interpreted differently. In this context, there is a presumption for their direct application towards individuals as well as other non-state actors such as TNCs the most powerful entity acting globally and influenced the global system.

2.3 The Recognition of International Legal Personality of International Organisations

The basic question with regard to the extension of international personality arises as: why do we want to know whether entities other than states have ILP? In the past, only states were endowed with the above personality; but since international law is not a static law but a law that is constantly growing both vertically and horizontally. It is necessary to find out whether entities other than states, which have become the concern of international law, have capacity to be possessing ILP. The fact that international organizations are admitted along with states as . *In the Reparation of Injuries case*[26], the International Court of Justice held that the United Nations is an international person, and it emphasized:

> "That is not the same thing as saying that it is a state, which it certainly is not, or that its legal personality and rights and duties are the same as those of a state...what of does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims."[27]

In other words the extension of ILP does not mean that international organizations and other non-state entities have acquired all the attributes of a state. It means that they

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[26] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) ICJ Reports, 174.

[27] Ibid., p. 179.

only enjoy some of these attributes so that the difference between a state and a non-state international person lies in the quantum of attributes with which each is endowed in international law.

Sir Humphrey Waldock defined an international agreement as "an agreement intended to be governed by international law and concluded between two or more states or other subjects of international law possessing international personality and having capacity to enter into treaties."[28] In his commentary, the ILJ special rapporteur pointed out that this formulation was designed particularly to indicate that international organizations might be party to international agreement. It should be pointed out that the existence of ILP does not itself support a power to make treaties and everything depends on the terms of the constituent instrument of the organization. So the capacity of international organization is determined according to the express or implied provisions for such capacity in the constitution of the organization. International organizations by its international legal personality have the following power and privileges:

1. Treaty making power.
2. Privileges and immunities.
3. Capacity to espouse international claims.

But they have also responsibility in their concerning subjects and they play a crucial role for improvement of norm of international law.

2.4 Status of TNCs under International Law

TNCs signify a form of organization intermediate between public international agencies and private corporations operating under international system. They have been instituted by treaty on a bilateral or multilateral basis for the fulfillment of certain joint international purposes by (1) participating governments, (2) by combination of governments and private enterprises, or (3) private companies representing government-approved monopolies. They perform economic tasks of a public nature for which they

[28] International Law Commission (1962), *Fourth Commission's Rapporteurs on the law of treaties*, 2 Ybk. I.L.C., p. 31.

require the long-term investment of capital and a permanent organization.[29] In the modern era of globalisation TNCs are not only influential economic participants in the current international system but are a participating actor in the international lawmaking as well as the law-enforcement processes.[30] TNCs played a key role in the adoption of the agreement on trade related aspects of intellectual property rights (TRIPS).[31] In addition, these entities are often involved in the various phases of WTO dispute settlement proceedings.[32]

The important role of TNCs as economic and political actors on the international scene results in chance for the promotion of community interests.[33] In the course of their economic and political activities they have potential to promote human rights and environment protection as well as the enforcement of core labour and social standards. These non-state actors have potential to influence on the home as well as the host countries and in the course of their economic and political activities effectively contribute in their development process.[34] However, either directly through their own conduct or indirectly by way of supporting state actors, these TNCs also have power to frustrate the universal promotion and protection of the environment, as well as human and labour rights.[35]

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[29] Friedmann, W. (1943), "International Public Corporation", 6 *Modern Law Review,* p. 185.

[30] Dupuy, P.M. (2005), 'Proliferation of Actors', in R. Wolfrum and V. Röben (eds) (2005), *Developments of International Law in Treaty Making,* New York: Springer 537, p. 541.

[31] Nowrot, Karsten (2002), "New Approaches to the International Legal Personality of Multinational Corporations: Towards a Rebuttable Presumption of Normative Responsibilities" *European society of International law*, p. 1.
(http://www.esil-sedi.eu/fichiers/en/Nowrot_513.pdf)

[32] Ibid., p.1, G. C. Shaffer, *Defending Interests – Public-Private Partnerships in WTO Litigation* (2003).

[33] Simma, Bruno (1994), From Bilateralism to Community Interest in International Law', *Recueil des cours* , volume 250 , issue VI , pp. 217-384, p. 235.

[34] Chen, J. (2004), 'International Institutions and corporate governance', in J. Chen (ed) (2004), *International Institutions and Multinational Enterprises: Global Players–Global Markets,* Massachusetts: Edward Elgar Publishing, Inc., p.6.

[35] Paust, J.J. (2002), 'Human Rights Responsibilities of Private Corporations', 35 *Vanderbilt Journal of Transnational Law,* p. 801, p. 817.

According to the predominant view among international legal scholars, various entities participating in contemporary international relations but all entity cannot be regarded as international legal persons, even if they may have some degree of influence on the international society. De facto participation is not equivalent to acting on the international scene in legally recognised ways thus cannot convey the status of a subject of international law.[36] For acting in such a ways it requires some form of community acceptance through the granting by states. There are no systematic reasons why non-state entities may not participate in the international legal system as legally recognized actors.[37] However, on the basis of these generally recognized prerequisites for achieving international legal personality, the currently prevailing view among international legal scholars is that TNCs cannot be regarded as subjects of international law..[38]But in the light of the changing structure of the international system it appears to be questionable whether these recognized prerequisites for the achievement of international legal personality in itself can still be regarded as an appropriate approach for the identification of normative responsibilities of influential non-state actors on the international scene.

2.5 Reconceptualization of the Doctrine of International Legal Personality

On question regarding the ILP of TNCs it is necessary to understand that the entity which play a crucial role and persuades the activities and affairs of international community should be recognized as ILP. Like company, TNCs which are largely responsible for the vast expansion of business transactions across political boundaries are considered as an 'artificial persons' created by law in domestic law. As early as in 1930 Sir Fisher Williams tries to recognise TNCs as juridical personalities:

> "... the gradual development of greater changes, and perhaps as a sign and forerunner of such a gradual development, it is interesting to see that the exclusive possession of the field of international law by states, this modern form of a kind of state monopoly, is

[36] Shaw, M. N. (2003), *International Law*, Cambridge: Cambridge University Press, p. 176.

[37] Nijman, J. E. (2004), *The Concept of International Legal Personality,* The Heague: T.M.C. Asser Press, p. 29.

[38] Rigaux, F. (1991), 'Transnational Corporations', in M. Bedjaoui (ed) ((1991), *International Law: Achievements and Prospects,* London: Martinus Nijhoff Publishers, 121, p. 129.

broken down by the invasion of bodies which are neither states, nor individuals, nor combinations of states or individuals, but right-and-duty bearing creations."[39]

So they have similar rights and responsibility as domestic corporations. But on internationals level in what mechanism a non-state entity possess international legal personality was asked in *Reparation for Injuries* case. In response to the question 'does an international organization possess international personality?' the ICJ opined that:

> "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights. Their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable."[40]

Rosalyn Higgins observed that "The normatively binding force of international law is based on the necessity of legal order for the satisfaction of needs and the pacification of social life".[41] The basic objective of the international legal order is to pursue international stability and to avoid disputes and the arbitrary use of power.[42] Therefore, international law is more and more independent of the will and interests of individual states. In the process of reconceptualization of international law substantive norms are focusing on 'the realization of community interests'. As a consequence, the recognition of international legal personality also has to orientate itself to the central aims pursued by the

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[39] Williams, J.F. (1930) "The Legal Charater of the Bank for International Settlement", *The American Journal of International Law*, Vol. 24, No. 4, Oct., 1930, pp. 665-673, p. 666.

[40] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) ICJ Reports, 174, p. 178. (1949).

[41] Higgins, Rosalyn (1994), supra note 4, p. 1.

[42] Higgins, Rosalyn (1999), "International Law in a Changing International System", 58 *Cambridge Law Journal,* 78, p. 95.

international legal order as well as to the changing sociological circumstances on the international scene.

There are two main objections made by scholars on traditional pattern of recognition of ILP. First is increasing inadequateness of the traditional understanding of ILP and secondly after the globalisation the nature of international law change from the relation among states to such other entities have transnational nature. Therefore the international legal order needs to set the relations between all the de facto powerful entities in the international system on a legal basis. International law furthermore has to legally discipline the conduct of all influential entities also in their interactions with less powerful actors, in order to effectively and comprehensively enforce the normative principles enshrined in its legal structure."[43] In light of these findings, the traditional prerequisites for international legal personality can no longer be regarded as an adequate approach for the allocation of community interests through the identification of normative responsibilities of de facto powerful non-state actors in the international system.

An approach to international legal personality, as Charney observed, is incapable of making all of the important actors as subject of international system. This problem creates intolerable gaps in the structure of the international normative order and "imposes unnecessary risks on the inherently frail international legal system".[44] If international law denies recognising effective entities as ILP, the result is a legal vacuum objectionable both in practice and principle". TNCs are the most powerful actors in the globalised world and unrecognised that power would be unrealistic. Therefore, the current predominant view concerning the prerequisites of ILP is (1) neither compatible with the central aim of the current international legal order, (2) nor is it reflective of the resulting

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[43] Thürer, Danial (1999), 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State', in R. Hofmann (ed), *Non-State Actors as New Subjects of International Law, Berlin: Duncker and Humblot,* at 58. International law's ordering and pacification functions are only being preserved if the state-centric understanding is replaced by the perception of this legal regime as a *jus inter potestates.*

[44] Charney, J. I. (1983), "Transnational Corporations and developing Public International Law", *Duke Law Journal,* 748-788, p. 769.

necessity for international law to be in sufficient conformity with the changing realities in the international system. Chris N. Okeke concisely formulated more than thirty years ago: "[I]f international law failed to influence and to regulate adequately the course of international relations, it would have lost its value."[45]

The increasing inadequateness of the traditional understanding of ILP leads to the need for a re-conceptualization of 'subjects of international law doctrine'. Against this background, a new approach to the creation of normative responsibilities of powerful actors in the international system will be introduced.[46]This new concept appears to be a far more appropriate doctrinal component of the current international legal order than the predominant view. The re-conceptualised subject's doctrine is based on the perception of the international legal order as a system of normative presumptions. The structure of international law has been shaped by rules of presumptions.[47] The primary aim pursued by international law needs a close conformity with the changing sociological circumstances on the international scene[48]. On the basis of this influential position in the international system a rebuttable presumption in favour of the respective actor arises with regard to the promotion of community interests such as the protection of human rights, the environment and core labour and social standards being, subject to applicable international legal obligations.

This approach ensures that besides state, all interactions between the influential entities in the international system as well as their relations to less powerful actors are *prima facie* subject to the international rule of law. It ensures that the international legal

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[45] Okeke, C. N. (1974), *Controversial Subjects of Contemporary International Law: An Examination of the New entities of International Law and their Treaty-Making Capacity:* Rotterdam: Rotterdam University Press, p. 217.

[46] Nowrot, K. (2004), Transnational Corporations and Global Public Goods: Towards a Presumption of Normative Responsibilities, *Policy Papers on Transnational Economic Law, No. 1/2004, p.* 2.

[47] Pauwelyn, J. (2003), *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law,* Cambridge: Cambridge University Press, p. 240.

[48] *Mosler*, H (1980), *The International Society as a Legal Community*, Alphenaan den Rijn: Sijthoff and Noordhoff International Publicers B.V., p. 48.

CHAPTER 3

INTERNATIONAL INITIATIVES FOR REGULATION OF TNCS

CHAPTER 3

INTERNATIONAL INITIATIVES FOR REGULATION OF TNCs

In the era of Globalisation TNCs are the most powerful and influential actors in the current globalised system. They are economical institution working for their own interest and generally not responsive for community and environment. To make them responsive and accountable it is necessary to regulate their activity. There are two main ways by which corporate activities can be regulated: through legal liability under national or international law, and voluntarily through codes of conduct and self-regulation. Voluntarily codes of conduct and self-regulation could be understood under the concept of Corporate Social Responsibility (CSR). There are following crucial initiatives taken under different regimes. Under UN regime three crucial instruments are applicable policing initiatives to TNCs: (1) UN Draft Codes of Conduct for Translational Corporations, 1990, (2) United Nations Global Compact, 2000, (3) UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, 2003. Under the European Legal Regime the OECD Guidelines for Multinational Enterprises is applicable. The WTO system, domestic law and voluntary or corporate codes of conduct are also other systems which regulate and influence the TNCs activity and behaviour.

3.1 UN Initiatives

Many international agencies have recognised the impact of TNCs on international relations and on the economic development and social well-being of the people of the world. The UN has been the premier international institution that has developed ideas, programs and initiatives to study and understand these corporations. The preamble to the United Nations Charter states that one goal of the organisation is

"to employ international machinery for the promotion of the economic and social advancement of all peoples.[1]

Some international instruments clarify the obligation of private individuals to comply with the expressed human rights norms by directly referring to them. For example, the preamble to the Universal Declaration of Human Rights (UDHR) states that "every individual and every organ of society" shall promote and secure the rights and freedoms included in this Declaration.[2] Thus TNCs, as organs of society, are required to ensure compliance with these rights.

The most important UN human rights instruments that apply to TNCs, despite the fact they are addressed principally to states, are as follows:

- Universal Declaration of Human Rights, 1948[3]
- The Convention on the Prevention and Punishment of the Crime of Genocide, 1948[4]
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965 [5]
- The International Covenant on Civil and Political Rights, 1966[6]
- The International Covenant on Economic, Social and Cultural Rights, 1966[7]
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984[8]
- The Convention against Corruption, 2003

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[1] United Nations Charter, 1945.

[2] Universal Declaration of Human Rights, Dec 10 1948, UN Doc A/810.

[3] *Ibid.,*

[4] UN Convention on the Prevention and Punishment on the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951).

[5] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

[6] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[7]International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

However, these instruments have not been able to ensure corporate compliance with certain standards for several reasons. Obligations are imposed on the states parties and not directly on TNCs; and therefore, they do not provide an effective controlling and enforcing mechanism addressed to TNCs.[9]

3.1.1 UN Draft Code of Conduct on TNCs, 1990

Origin and Development

The UN General Assembly, for the first time in 1968 in its Declaration on Social Progress and Development, provided for the elimination of all forms of foreign economic exploitation, particularly those practiced by TNCs.[10] In 1974, the General Assembly Resolution 3201, on the 'Declaration on the establishment of a New International Economic Order', provided that one of the principles upon which the new order should be founded is on the right of regulation and supervision of activities of TNCs by the host countries.[11] The General Assembly Resolution 3281 on the Charter of Economic Rights and Duties of States, once again reiterated the nations state's right to regulate and exercise authority over TNCs. It also prohibited TNCs from interfering in the internal affairs of host a State.[12] The General Assembly, in its Resolution 3514, condemned the corrupt practices of TNCs.[13]

UN Under-Secretary-General crafted a resolution in 1972 calling for the formation of a group of eminent persons "to study the impact of multinational corporations on economic development and international relations.[14] The goal of this

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[9] Deva, Surya (2003), "Human Rights Violations by Multinational Corporations and International Law: Where from Here?", *19 Connecticut Journal of International Law*, pp. 1-57, p. 13-14.

[10] UNGA. Res. 2542 (XXIV), Dec. 11, 1969.

[11] UNGA. Res. 3201 (S-IV), Mayl, 1974, para. 4.

[12] UNGA. Res. 3281 (XXIX) of Dec. 12, 1974, Art. 2 (2). It was adopted by a roll-call vote of 120 in favour to 6 against with 10 abstentions.

[13] UNGA. Res. 3514 (XXX) OF Dec, 15, 1975.

[14]Sagafi-Nejad, (2008), *The UN and Transnational Corporations: from Code of Conduct to Global Compact,* Bloomington, USA: Indiana University Press, p. 52.

study was to create a "focal point" within the United Nations to develop the "institutions needed for a new international economic order". On August 2, 1974, the ECOSOC established an information and research centre on TNCs which was directly attached to the Office of the Secretary- General.[15] On December 5, 1974, ECOSOC established a 48-member commission known as the United Nations Commission on Transnational Corporations (UNCTC) to function as an advisory body to ECOSOC on TNCs.[16]A central recommendation of the UNCTC was work on drafting a code of conduct for TNCs. The Information and Research Centre on TNCs was asked to help the commission in formulating a code of conduct. The Group of 77 developing countries, supported by the socialist bloc, demanded a legally binding international instrument of rules to govern the activities of TNCs.[17]

In drafting UN Draft Code of Conduct on Translational Corporations[18] (UN Draft Code) the drafters took into consideration differing views of both developed and developing countries. The Draft Code refers to all aspects of TNCs i.e. their organisational structures, investment policies, their responsibilities towards host countries, the obligations of home countries and the probable means of exercising control over their activities by host countries.[19]

Goals of the UN Draft Code

It seems to be a consensus that there needs a secure effective international arrangements for the operation of TNCs and this is possible only through the formulation of a code of conduct for TNCs. The basic objective of the Draft Code is to strengthen the international economic and social co-operation. For achieving this goal maximizes the contributions of TNCs to economic development and growth and

[15] ECOSOC, Res.1908 (LVII).

[16] ECOSOC, Res.1913 (LVII).

[17] Sagafi-Nejad (2008), supra note 14, p. 108.

[18] UN ECOSOC (1990), *UN Draft Code of Conduct on Transnational Corporations,* U.N. Doc. E/1990/94 (June 12, 1990).

[19] Sheikh, Saleem and Rees, William (2000), *Corporate Governance and Corporate Control*, London: Cavendish Pub, Ltd., p. 253.

to minimize the negative effects of the activities of these TNCs. The code of conduct should aim at strengthening state sovereignty which is constantly under a threat of violation by the economic power of TNCs.[20] The host country should have the right to regulate foreign-owned business within its jurisdiction without any outside interference or presence. The General Assembly Resolution 3201 (S-IV)[21] and 3202 (S-VI)[22] also makes provisions regarding this issue.

Contents of the UN Draft Code

The code contains a preamble and 71 paragraphs divided into the following five parts. According to the preamble the main goal of TNCs is to (1) maximize the contributions of TNCs to economic development and growth, and (2) to minimise the negative effects of the activities of these corporations.[23]

a. Definitions and Scope of Application

The term entities, TNCs, home country, host country and 'country in which a TNCs operates' are defined in this code. Generally TNCs is often referred to synonymously as a MNCs or multinational enterprises. In UN draft code a TNCs is defined as incorporated enterprises comprising a parent enterprise and its foreign affiliates. A "parent enterprise" is defined as an enterprise that directly or indirectly controls assets of other entities in countries other than its home country. A foreign affiliate is an incorporated enterprise in which an investor owns a stake that permits a lasting interest in the management of that enterprise. A foreign affiliate can be a subsidiary, an associate or a branch.

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[20]Burchill, C.S. (1970), "The Multi-National Corporation: An Unresolved Problem in International Relations" *Queens Quarterly*, vol. 77:1, pp. 3-18, p. 9.

[21] UNGA Res. 3201 (S-IV), supra note 11, para. 4.

[22] UNGA Res. 3202 (S-VI), Section V of the program of action.

[23] UN Draft Code (1990), *preamble.*

This Code is relevant and governs all enterprises which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres. Country of origin, their ownership, legal form and fields of activities of these entities are immaterial for the application of the codes.[24]

b. ***Obligations of Transnational Corporations***

Activities of TNCs are divided into three types: (1) general (2) economic social and financial and (3) disclosure of information. In **general** obligation codes provide TNCs many functions and duties. *Firstly* TNCs shall respect the national sovereignty and obey the domestic laws, regulations and administrative practices.[25] Developing host countries are often handicapped by deficient legislation and a lack of trained administrative personnel.[26] The technical and financial power of TNCs also prevents arm's length bargaining between them and developing host countries.

Secondly TNCs should carry out their activities in conformity with the development policies, objectives and priorities of the host countries government.[27] Host countries have faced the inevitable tensions between national economic policies and profit-maximizing motives of foreign entrepreneurs whose decision are taken out of the country where they operate.[28]Developing host countries tried to focus their attention on TNC for the purpose to take contribution in development process of country but their complaint has been that the TNCs play an insufficient and perhaps even a negative role in development programs.[29] *Thirdly* the code impose obligation

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[24] Ibid., para. 1(a).

[25] UN Draft Code (1990), para. 7-9.

[26] UNCTC (1976), National Legislation and Regulations Relating to Transnational Corporations, Report of the Secretariat, U.N. Doc. E/C.10/8, p. 9, 10.

[27]UN Draft Code (1990), para. 10-11.

[28]Muller, Ronald (1975), "A Qualifying and dissenting View on the Multinational Enterprises", in G. Ball, *Global Companies: The Political Economy of World Business,* Prentice-Hall, 1975 - Business & Economics, p. 185.

[29] Report of Secretariat on TNCs, *13 Foreign Policy 71* (1973-74)

on either party that contracts or agreements should be negotiated and implemented in good faith."[30] This concept is basic principle of contractual obligation and TNCs often enter into contracts with a view to form corporate or contractual joint enterprise which represent an "an organisational form for achieving economic objectives.[31] Without intention to perform their obligation the whole objective of contract will be frustrate. There are some other liabilities such as to respect the social and cultural values, and traditions; respect human rights and fundamental freedoms; not interfere in the internal affairs, refrain to offering, promoting or giving of any payment, gift or other advantage to a public official to host country.

In category of '**Economic, financial and social obligation**' code provides following crucial function. *First* in allocating the decision-making powers among their entities TNCs should make every effort as to enable them to contribute to the economic and social development of the host country.[32] *Secondly* TNCs, in respect of their intra-corporate transactions, should not use pricing policies that are not based on relevant market prices or the arm's length principle in the absence of such prices.[33] Through transfer pricing, TNCs not only artificially depresses the earning of the workers in the affiliate firms but also deprives the host government of its fair share of the revenue from corporate income taxes.[34]

Thirdly TNCs shall not use their corporate structure and modes of operation contrary to the laws and regulations of the countries in which they operate.[35] Through transfer pricing, they can evade or avoid the taxes and minimise the government

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[30]UN Draft Code (1990), para. 12.

[31]Peter, Wolfgang ed. Al. (1995), *Arbitration and Renegotiation of International Investment Agreements,* The Hague, Kluwer Law International, p.11.

[32] Ibid., para. 21.

[33] Ibid., para. 33. Transfer pricing is related to buying and selling among the parent company and its affiliates or among the affiliates themselves of particular goods, services, technical know-how, lending of money, or permission to use parent products at arbitrarily set charge.

[34] Burchill (1970), supra note 20, p. 174.

[35] UN Draft Code (1990), para. 34.

interference. The double taxation affects the competitive power of the TNCs, compared to TNCs whose home country tax the income originating from local sources only or tax it at a very low rate.[36] TNCs shall confirm to the transfer of technology laws and regulations of the countries in which they operate. *Fourthly* TNCs should contribute to the strengthening of the scientific and technological capacities of developing host countries, in accordance with the science and technology established policies and priorities of those countries.[37]Technology must be considered as a social good whose administer and orientation must conform to social objectives. So the TNCs should not be allowed to charge for technology transferred between subsidiaries and the parent company or between subsidiaries of the same TNCs.[38]

There are some other functions which need to follow by TNCs as: the direction of ILO Tripartite Declaration[39]; carry out their operations in conformity with laws, regulations and policy especially in context of Balance of Payments and financing,[40] to follow Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Principles[41] and carry out their operations in accordance with national laws, regulations, concerning consumer protection and preservation of the environment to relevant domestic laws and international standards.[42]

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[36] Verma, S.K. (1976), "Taxation of Multinational Corporations", *Indian Journal of International Law*, Vol.16, pp. 93-168, p. 94.

[37]UN Draft Code (1990), para. 36. Scientific and technological capacity falls into two main capacities; (i) developing domestic capacity to use and create knowledge; and (ii) acquiring knowledge from abroad.

[38] Annexure III of the UNCTAD: Trade and Development Board, Proposals before the committee on Transfer of Technology, reproduced in I.L.M. Vol. 14 (1975), p. 1335.

[39] International Labour Office (2000), "*Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*" Official Bulletin, Vol. LXXXIII, Series A, No. 3, Geneva.

[40] UN Draft Code (1990), para. 26-32.

[41] Adopted by the General Assembly in its resolution 35/63 of 5 December 1980

[42] Ibid., para. 41-43.

In third category **disclosure of information** is crucial for the transparency and relations of good faith between TNCs and host countries. TNCs should disclose full and comprehensible information on the structure, policies, activities and operations of the TNCs to the public in the host countries by appropriate means of communication.[43] One of the basic difficulties posed by transnational nature of the TNCs is the inaccessibility to full information on TNCs activities that confronts host country authorities. Developing host governments are incapable of obtaining from the TNCs parent located abroad adequate data to properly evaluate the operations of the TNCs subsidiary implanted within its borders.[44] The lack of access to relevant accounting data on a parent or subsidiary located outside the jurisdiction makes it difficult to monitor transfer pricing.[45]

c. Treatment of Transnational Corporations

Treatment of TNCs is divided into four parts: (1) general provision relating to treatment of TNCs; (2) nationalisation and compensation; (3) jurisdiction and (4) Dispute settlement. In **general** provisions it is obligation on states to fulfil, in good faith, their obligations under international law. TNCs shall receive fair and equitable treatment in the countries in which they operate. TNCs are entitled to transfer all payments legally due. Such transfers are subject to the procedures laid down in the relevant legislation of host countries, such as foreign exchange laws, and to restrictions for a limited period of time emanating exceptional balance of payment difficulties.[46] The second category as nationalisation and compensation on the one sides the state have right to nationalise or expropriate the assets of a TNCs in their territories on the other side it is duty on them to pay compensation in accordance with

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[43] Ibid., para. 44-46. The information includes financial as well as non-financial items and should be made available on a regular annual basis.

[44] Report of Group of Eminent Persons (1974), The Impact of Multinational Corporations on Development and on International Relations, U.N. Doc. E/5500/Rev. I, ST/EAS/6, p. 55.

[45] Chown, John F. (1974), *Taxation and Multinational Enterprises*, Longman: Business & Economics, p. 89.

[46] UN Draft Code (1990), para. 47-54.

the applicable legal rules and principles.[47] With regard to jurisdiction, TNCs as an entity is subject to the jurisdiction of the country in which it operates.[48] Under UN Draft code disputes between states and entities of TNCs, which are not amicable settled between the parties, shall be submitted to competent national courts or authorities. Where the parties so agree, or have agreed, such disputes shall be referred to other mutually acceptable or accepted dispute settlement procedures.[49]

d. Intergovernmental Co-operation

Intergovernmental co-operation is essential in accomplished the objectives of the Code. Intergovernmental co-operation should be established or strengthened at the international level and, where appropriate at the bilateral, regional and interregional levels.[50] The code provides that government action on behalf of TNCs should be subject to the principle of exhaustion of local remedies and on the agreement of governments concerned procedures for dealing with international claim. Para 18 and 19 would provides that TNCs should not request Governments to act inconsistently with par 65.

e. Implementation of the Code of Conduct

There are three mechanisms for the implementation of the codes of conduct: (1) Action at the national level; (2) International institutional machinery (3) Review procedure. At the national level state shall publicize and disseminate the code; follow the implementation of the Code within territories; report to the UNCTC to promote the code; take action to reflect their support for the code and take into account the objectives of the code in order to ensure and promote implementation of the Code.[51]

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[47] Ibid., para. 55.

[48] Ibid., para. 56.

[49] UN Draft Code (1990), para. 58-59.

[50] Ibid., para. 59-65.

[51] UN Draft Code (1990), Para. 66.

National implementation measures include publication, promotion, and consideration in regulatory decision making and reporting the experience regarding the TNCs.

On international level the UNCTC shall assume the function of the international institution machinery for the implementation of the Code.[52] It shall discuss at its annual sessions matters related to the Code periodically assess the implementation of the Code. Assessment should be based on reports submitted by governments, specialised agencies and non-governmental organizations. Commission shall report its activities regarding the implementation of the Code to the UNGA through the Economic and Social Council in every year. Regarding *review procedure* the commission shall make recommendations to the General Assembly through the Economic and Social Council. The first review shall take place not later than six years after the adoption of the Code. The General Assembly shall establish, as appropriate, the modalities for reviewing the Code.[53]

The idea of adopting codes of conduct was the recognition of the gap contained in the Bretton Woods system. The system does not define the rights and obligations of foreign investors, nor any organisation to create such a regime either for study or for regulation of the activities of TNCs. The activities of TNCs became increasingly dominant in the international economy, so the international community began to focus more sharply on this issue. The objective of non binding nature of codes of conduct was that non binding nature made easier for governments to adopt

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[52] Ibid., para. 67-70. UNCTC began functioning in November 1974. Its work was to be guided by three broad objectives: (1) to promote the understanding of the political, economic, social and legal effects of TNC activity, especially in developing countries; (2) to secure international arrangements that promote the positive contributions of TNCs national development goals and world economic growth while controlling eliminating their negative effects; and (3) to strengthen the negotiating capacity of host countries, in particular developing countries, in their dealings with TNCs. As part of the reorganization of the economic sector of the UN, the UNCTC was dissolved in 1993 and the Programme on TNCs was transferred to UNCTAD where it continues to grow and develop according to the needs and priorities of the international community.

[53] Ibid., para. 71.

them which can influence international economic relations and produce legal effects to some extent. The drafter of codes of conduct thought that the codes may be forerunners of binding legal obligations both nationally and internationally.[54] Thus, they tried to define the rights and responsibilities of states and TNCs in a balanced manner. It would helped to minimize any negative effects associated with the activities of TNCs and thereby contribute to a reduction of friction and conflict between host governments and TNCs.[55] It would enable the flow of FDI to realize its full potential in the development process. Because of the rigid attitude of developed countries on certain contentious issues (i.e. on the issue of nationalisation and compensation the applicability of international law and national treatment) the negotiations pertaining to the establishment of the codes never succeeded and came to the end.

3.1.2 United Nations Global Compact, 2000

Origin and Development

United Nations Secretary-General Kofi Annan, who introduced the idea of United Nations Global Compact (UNGC), proposed it at the World Economic Forum in Davos in 1999.[56] UNGC asks companies to embrace, support, and promote a set of ten fundamental social values in the areas of human rights, labour standards, environmental practices, and anti-corruption policies. There is clearly a role for the United Nations in standard-setting on international corporate governance as a much

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[54]Joyner, Christopher C. (1999), *The United Nations and International Law,* Cambridge: University of Cambridge, p. 261.

[55]Correa, Carlos M. and Kumar, Nagesh (2003), *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options*, London: Zed Book Ltd., p. 33.

[56] According to Annan, "The business community can uphold human rights and decent labour and environmental standards directly, by your conduct of your own business. You can make sure that in your own corporate practices you uphold and respect human rights, and that you are not yourselves complicit in human rights abuses...You can undertake initiatives to promote greater environmental responsibility. And you can encourage the development and diffusion of environmentally friendly technologies." Speech of Kofi Annan's before World Economic Forum in Davos on 1 February, 1999. (http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=22).

needed public good. By 2008, over 4,700 businesses in 120 countries around the world had signed up to the principles.[57] It attempts galvanize TNCs and other corporations into compliance with international social standards through its ten principles.

Goals of the UNGC

The aim UNGC is to achieve two complementary goals. The first is to persuade business to internalize the UNGC's principles by making them an integral part of the business culture, strategy, and operations of participating corporations. The second goal is the facilitation of collective problem solving through stakeholder cooperation.[58] It is thus designed both to influence the behaviour of participants and to instigate normative changes in their governance and policy-making processes. These principles are sufficiently broad to encompass most areas of international social concerns. The goal of UNGC is to promote "responsible" global capitalism and to promote the idea that TNCs "can do well by doing good."[59]

Contents of the UNGC

UNGC covers four broader areas of human rights, labour, environment, and anti-corruption. These fields are supported by the following international agreements:

- The Universal Declaration of Human Rights, 1948;
- The International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, 1998;
- The Rio Declaration of the United Nations Conference on Environment and Development, 1992;
- The Convention against Corruption, 2003.

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[57]Ibid., p.105-6.

[58]Oshionebo, Evaristus (2009), *Regulating Transnational Corporations in Domestic and International Regimes; An African Case Study*, Toronto: University of Toronto Press, p. 119.

[59]Moran, Theodore H. (2009), "The United Nations and Transnational Corporations: A Review and a Perspective", *Transnational Corporations,* Vol. 18, No. 2, pp. 91-112, p.105.

a. Human Rights

UNGC has reminded business and stakeholders that human rights principles are universal. It has provided a unique and essential platform for dialogue, enabling business. Government, civil society and trade union to discuss, debate and create progress. The UNGC inclusion of two human rights principles legitimized and accelerated the adoption of human rights policies and practices by TNCs across the globe. UNGC encourages two human rights principles on business to:

- observe, support, and respect the protection of internationally proclaimed human rights;
- Make sure that they are not complicit in human rights abuses.

The responsibility for human rights does not rest with governments or nation states alone but also upon business community. Human rights issues are important both for individuals and the organisations that they create. UNGC imposes an obligation upon the business community to uphold human rights both in the workplace and more broadly within its sphere of influence. "Complicity" is a difficult concept to appreciate and categorise. Understanding complicity, in order to avoid complicity in human rights violations, represents an important challenge for business.[60] The role of governments in ensuring respect for human rights continues to be extremely important.

b. Labour Standard

The involvement of private party in decision-making dialogue remains an essential component for a sound and prosperous economy, for respect for labour rights, for social justice and for a healthy environment. In this process UNGC labour standard play a crucial role in the protection and development of labour rights. Labour standard are needed to address the wrongs of globalisation and to ensure that future

[60] Mary Robinson, the UN High Commissioner for Human Rights, said that "Complicity is not a static concept. The contemporary limits of what is meant by complicity tell us a lot about our sense of community and responsibility towards others." Guide to the Global Compact: A Practical Understanding of the Vision and Nine Principles, (2003), p. 24.

(http://b2b.psa-peugeot-citroen.com/fileadmin/aides/espagnol/gcguide.pdf)

economic recovery is sustainable and equitable. Labour standard refer to five core articles of the International Labour Organisation concerning freedom of association and protection of the right to organize; the right to organize and bargaining collective; the prohibition of all forms of forced or compulsory labour; the abolition of exploitative child labour; and the elimination of discrimination with respect to employment and occupation. UNGC imposes obligation to business to uphold these core rights.

These principles are also the subject of ILO Conventions. The aim of the ILO is to connect the support of the business community through the UNGC. Labour Rights principles deal with fundamental principles in the workplace and the challenge for business is to take these universally accepted values and apply them at the company level. Freedom of association and the exercise of collective bargaining provide opportunities for constructive rather than confrontational dialogue. Worker association and trade union focus on solutions that result in benefits to the enterprise, its stakeholders, and society at large.[61]

c. *Environment*

The UNGC's principle establishes leadership and organisational change model in every field. UNGC Environment principle emphasis on TNCs to respond to the changing business environment by adopting new and effective tools and communicate their ethical culture regarding protection of environment. UNGC requests corporation and business Community to: (1) support a precautionary approach to environment challenges; (2) undertake initiatives to promote greater environmental responsibility; (3) encourage the development and diffusion of environmentally friendly technologies. The Rio Declaration established the link between environmental issues and development by stating that:

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[61] Global Compact Principle Three at (http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle3.html)

"... In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[62]

Human activities today are transforming materials and energy into products and services at such a scale that they influenced environmental change in broad level is occurring. In environmental issue precautionary principle is essentially a 'better safe than sorry' principle which attempts to shift the burden of proof in disputes about environmental damage.[63] The environmental principles of the UNGC provide an entry point for business to address the key environmental challenges. In particular, the principles direct activity to areas such as research, innovation, co-operation, education, and self-regulation that can positively address the significant environmental degradation, and damage to the planet's life support systems, brought by human activity.

d. Anti-Corruption

This principle was not included in original UNGC. In December 2003, United Nations Convention against Corruption, an important global instrument to fight against corruption, was adopted in Merida, Mexico. On 24 June 2004, during the UNGC Leaders Summit it was announced that the UNGC henceforth includes a tenth principle against corruption.[64] It demonstrated a new willingness in the business community to play its part in the fight against corruption. The UNGC exhorts business "to work against all forms of corruption, including extortion and bribery." According to their principles participants are not only to avoid bribery, extortion and other forms of corruption, but also to develop policies and concrete programs to address corruption.

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[62]UNGC Environmental Principles Training Package (2004), "Understanding The Global Compact Environmental Principles", *UNGC Delegates Manuals*,, pp. 65-103, p. 17.

[63]Ibid., p. 68

[64] Global Compact Principle 10 at Transparency and Anti-corruption (http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/anti-corruption.html)

Institutional Mechanism

The UNGC operates through several engagement mechanisms: leadership, dialogue, learning, partnership projects, and network/outreach[65]:

1. The mechanism of 'leadership' demands commitment and transparency from participating corporations. It asks that those who manage the affairs of corporations specifically commit to the UNGC's principles and that corporations publically report on action undertaken in support of the principles.

2. 'Dialogue' is intended 'both to influence policy-making and the behaviour' of participants. It also enables participants to work together, isolate problems, and devise common solutions.

3. The 'learning mechanism' which is at the centre of the web of relationships' in the UNGC, is aimed at three goals: (a)the identification and dissemination of critical knowledge gaps; (b)the sourcing and communication of good governance practices; and (c) the fostering of accountability and transparency by way of public disclosure of relevant information through the UNGC's web portal.

4. With the aid of the 'Learning Forums' the UNGC puts principles- some of which may be obtained through dialogue- into practice. The learning forums develop case studies of good corporate practices and how they are put into practice. Experience gained from the case studies is then shared with other participants.

5. Through 'Partnership Projects' participants attempt to contribute to the UN's developmental goals and, in particular, achieve the UNGC's goal of providing more opportunities for the poor.

6. Finally, there is the networks/outreach mechanism, which is the primary medium of engagement with stakeholders. Organised along regional, country or industrial lines, the networks enable participants to discuss global corporate responsibility issues in a special local and regional context and impact of the UNGC.

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[65]Oshionebo, Evaristus (2007), "The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities", *Florida Journal of International Law*, Vol. 19, Number 1, pp 1-38, p.14.

Critics charge that the UNGC, by entering into a partnership with corporations, gives corporate wrongdoers an opportunity to launder their image. UNGC, critics further allege, create 'undue corporate influence' at the UN that weakens the work of intergovernmental agencies, while it distracts governments and the UN from the necessary steps to establish an effective intergovernmental framework for corporate accountability[66]. In this sense, the UNGC could be likened to a 'clearing house' for best corporate governance information and practices.

3.1.3 UN Norms on the Responsibilities of TNCs and other Business Enterprises with regard to Human Rights, 2003[67]

Origin and Development

The drafting history of the UN Norms began when the Sub-commission in its resolution 1998/8 of August 20, 1998,285 established a working group of the Sub-commission consisting of five of its members, which received a mandate for a three-year period "to examine the working methods and activities of transnational corporations." [68] The working group considered the first draft code of conduct for companies in August 2000.[69] After considering all received comments, the working group submitted a draft of the Norms to be presented at the fifty-fifth session of the Sub-Commission in July-August 2003.[70] Finally, during the fifty-fifth session, the working group adopted a revised version of the Norms and the Commentary, and submitted the document to the Sub-Commission, which approved the Norms in its

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[66] Ibid., p. 122

[67] Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, UN ESCOR, 55th Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) [hereinafter Norms on HR (2003)].

[68] Weissbrodt, David and Kruger, Muria (2003), "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", 97 *American Journal of International Law,* p. 901-922, p. 927.

[69] Sub-Commission, Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its Second Session, UN Doc. E/CN.4/Sub.2/2000/12, para. 26-58.

[70] Weissbrodt, David and Kruger, Muria (2003), supra note 68, p. 906.

Resolution 2003/16 of August 13, 2003.[71] Adoption of the Norms received a strong support from a large number of NGOs, and some of them stated their intention to use the Norms as standards for reporting on business conduct with regard to human rights.[72] The UN Norms on HRs currently represent the most significant instrument at the international level to impose a wide range of obligations on TNCs.

Goals of the UN Norms on Human Rights

The fundamental goal of UN norms on HRs is to promote and protect human rights on an international scale. The norms provide that TNCs and other business entities have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."[73]These norms may be viewed as a basis for the potential development of a treaty, establishing and confirming the rudimentary obligations of states individuals and corporations to respect and promote human rights. In this way, the norms ensure that businesses with larger influence have adequate responsibilities in protecting human rights.

Contents of the UN Norms on Human Rights

The norms consist of a preamble followed by eight sections and definitions of major terms. The preamble of the norms specifically refers to major UN documents.[74]

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[71] Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Sub-Commission on the Promotion and Protection of Human Rights [hereinafter Sub-Commission], Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, p. 52 (2003) [hereinafter *Res. 2003/16*], para. 1

[72] Weissbrodt, David and Kruger, Muria (2003), supra note 68, p. 906.

[73] Norms on HR (2003), para. 1.

[74] The preamble refers to Universal Declaration of Human Rights; Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Rio Declaration; the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the ILO Declaration on Fundamental Principles and Rights at Work; and many others. Norms on HR (2003) preamble.

It also refers to other essential international documents, such as the OECD Guidelines for Multinational enterprises, and the 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions'. Direct reference to the most crucial international human rights instruments is one of the most significant features of the norms.[75] By doing this, the norms gain more respect that is related to the high authority of the international instruments mentioned in the preamble of the norms.

a. ***General Obligations***

The first paragraph of the norms clarifies general obligations of states, TNCs and other business enterprises in promoting and securing human rights. This paragraph establishes a general rule that is applicable to all other sections and should be kept in mind when reading other sections of the instrument.[76] Primary responsibility to promote and secure human rights is left upon states, including their responsibility to ensure that TNCs and other business enterprises respect human rights.[77] By emphasizing primary state responsibility in the area of human rights, the norms send a clear message to governments: they cannot use the Norms to justify their failures in protecting human rights.[78] This is also supported by paragraph 19 of the Norms (savings clause), which provides that nothing in the norms shall be construed to diminish, restrict or adversely affect human rights obligations of states or more protective human rights norms.[79]TNCs and other business enterprises responsible for promoting and respecting human rights means that enterprises with larger influence should also have larger responsibilities.

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[75] Deva, Surya (2004), "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?", *10 ILSA J. INT'L & COMP. L.*, pp. 493-522, p. 498.

[76] Sub-Commission, Commentary (2003), para. 1(a).

[77] Norms on HR (2003), para. 1.

[78] Weissbrodt, David and Kruger, Muria (2003), supra note 68, p. 912.

[79] Norms on HR (2003), para. 19.

b. Right to Equal Opportunity and Non-discriminatory Treatment

The second section of the Norms deals with the right to equal opportunity and non-discriminatory treatment, which is one of the most crucial workers' rights.[80] Prohibited reasons for discrimination include race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age, health status, disability, marital status, capacity to bear children, pregnancy and sexual orientation.[81] However, greater protection of children does not constitute discrimination.[82] Additionally, the commentary on the Norms defines discrimination as "any distinction exclusion, or preference made on the above-stated bases, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[83]

c. Right to Security of Persons

The third section deals crimes recognised within international regime against human beings.[84] Businesses shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, force or compulsory labor, hostage-taking, extra-judicial, summary or arbitrary executions, nor other violations of humanitarian law and other international crimes against the human person. Some readers might believe that this paragraph does not need to be included in the Norms.[85] However, this paragraph has proved to be necessary as a result of past experiences. One of the most representative examples is the Zyclon B Gas Case, where the

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[80] *Ibid.*, para. 2.

[81] Sub-Commission, Commentary (2003), para. 2(a).

[82] Norms on HR (2003), para. 2.

[83] Sub-Commission, Commentary (2003), para. 2(b).

[84] Norms on HR (2003), para. 3.

[85] Hillemanns, Carolin (2003), "*UN Norms on the Responsibilites of Transnational Corporations and Other Business Enterprises with regard to Human Rights*", *4 GERMAN L. J.*, pp. 1065-1080, p. 1065, *available at* <http://www.germanlawjournal.com/print.php?id=330>;

provider of the gas that was used to kill concentration camp prisoners was convicted for complicity in international crimes.[86]

d. Rights of Workers

The fourth section formulates the following rights of workers: prohibition of forced or compulsory labour; prohibition of economic exploitation of children; the right to a safe and healthy working environment; remuneration ensuring adequate living for workers and their families; freedom of association; the right to collective bargaining; and finally, the right to establish and join organizations of the worker's own choosing.[87] The commentary on the norms further refers to relevant international instruments, mostly to ILO conventions.[88]

e. Respect for National Sovereignty and Human Rights

The fifth section, entitled 'Respect for National Sovereignty and Human Rights', addresses a wide scope of rights regarding the relationship between TNCs and host governments.[89] By including this section, the Norms take a modern approach towards the social role of TNCs.[90] TNCs are not anymore required to respect only political and civil rights, but also social, economic and cultural rights, including the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression.[91] Additionally, this section also includes prohibition of bribery.[92] Even though the Norms shall be given credit for including those rights, it is not clear how to exercise

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[86] *United Kingdom v. Tesch, et al.* (Zyclon B Gas Case), Law Reports of Trials of War Criminals 93, 102 (1947).

[87] Norms on HR (2003), para. 5-9.

[88] Sub-Commission, Commentary (2003), para. 5(a); 5(c); 6(a); 6(d); 7(a); 8(a); 8(e); 9(a); 9(b); 9(c).

[89] Norms on HR (2003), para. 10-12.

[90] Deva, Surya (2004), supra note 75, p. 507.

[91] Norms on HR (2003), para. 12.

[92] *Ibid.*, para. 11.

them in reality.[93] The rights are described in very broad terms without any specification on the manner in which they should be brought into practice.

f. Consumer Protection

The sixth section of the Norms deals with obligations related to consumer protection, which include the obligation of companies to act in accordance with fair business, marketing and advertising practices; the obligation to take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle; and the prohibition of producing, distributing, marketing, or advertising harmful or potentially harmful products for use by consumers.[94] Moreover, the Commentary on the Norms refers to existing relevant international instruments on consumer protection to be observed by businesses.[95] The Commentary also provides that in cases where a product is potentially harmful to the consumer, companies are required to disclose all appropriate information on the contents and possible hazardous effects of the products they produce, which can be done through proper labeling, informative and accurate advertising.[96]

g. *Environmental Protection*

The seventh section of the Norms addresses obligations of TNCs and other business enterprises with regard to environmental protection.[97] TNCs are required to observe national as well as international law related to preservation of environment, human rights, public health and safety, bioethics, and the precautionary principle. Moreover, business conduct of TNCs shall be performed in accordance with the wider goal of sustainable development. Since environmental laws of host countries do not always prove very effective and often consist of very low environmental standards, it is crucial that the Norms require businesses to respect international agreements and

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[93] Deva, Surya (2004), supra note 75, p. 507-08.

[94] Norms on HR (2003), para. 13.

[95] Sub-Commission, Commentary (2003), para. 13(a); 13(b).

[96] *Ibid.*, para. 13(e).

[97] Norms on HR (2003), para. 14.

standards.[98] However, the vague formulation of environmental international standards does not seem to provide enough environmental protection.[99]

Implementation Provision

The Norms deal with their implementation in section eight. They provide with implementation procedures on several levels, starting from implementation by business enterprises themselves, and then moving on implementation by intergovernmental organizations, states, unions, and others.[100] Businesses are required to adopt internal codes of conduct reflecting the content of the Norms and to ensure that these codes are disseminated. They are also required to report periodically on which measures were taken to implement the Norms.[101] In case of their non-compliance with the Norms, business enterprises shall ensure that adversely affected persons, entities and communities are provided with adequate reparation.[102]The Commentary on the Norms encourages trade unions to use the Norms as a basis for negotiating agreements with companies and monitoring compliance with them.[103] Finally, the Norms call upon governments to use the Norms as a model for legislation or administrative provisions related to businesses conduct within their respective territories.[104]

In comparison to other international instruments seeking to regulate TNCs, the Human Rights Norm has several advantages. First, it directly refers to major

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[98] Deva, Surya (2004), supra note 75, p. 509.

[99] Ibid., p. 509.

[100] Norms on HR (2003), para. 15-18.

[101]Ibid., para. 16.

[102]Ibid., para. 18.

[103]*Ibid.*, para. 16 (c).

[104]*Ibid.*, para. 17.

international human rights instruments in their text.[105]The Norms are addressed directly to all business enterprises (included TNCs) and impose obligations on them, which is in sharp contrast with most international documents that impose obligations primarily on governments.[106]The Norms certainly represent a radical step towards imposing obligatory standards on TNCs conduct. However, the Norms still lack enough details concerning the implementation mechanism.[107]

3.2 OECD Guidelines on Multinational Enterprises, 1976 (2000)

Origin and Development

The OECD guidelines were adopted in 1976 and are currently supported by 39 adhering governments consisting of all 30 OECD member countries and 9 non-member countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia).[108] The guidelines are non-binding recommendations to ensure their compliance with laws and policies of the countries where they operate.[109] The guidelines were amended in 1979, in 1984, in 1991, and in 2000.[110] The latest guidelines revision states that multinational enterprises should "respect the human

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[105]Oldenziel, Joris and Bohman, Anna (2004), The added value of the UN Norms: A comparative analysis of the UN Norms for Business with the OECD Guidelines, the Global Compact, and the ILO Declaration of Fundamental Principles and Rights at Work, p. 5-7. (http://zunia.org/uploads/media/knowledge/The%20added%20Value%20of%20the%20UN%20Norms,%20SOMO,%202004.pdf)

[106] Deva, Surya (2004), supra note 75, p. 500.

[107] Oldenziel, Joris and Bohman, Anna (2004), supra note 105, p. 13.

[108] OECD Guidelines for Multinational Enterprises, (2000) About (last visited June 28, 2005), *at* <http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html>;

[109] Ibid., Art. 1.

[110] Salzman, James (2000), "Labor Rights, Globalization and Institutions: The Role and Influence of The Organization for Economic Cooperation and Development", Michigan Journal of International Law 21, No. 4, pp. 769–848, p. 795.

rights of those affected by their activities consistent with the host government's international obligations and commitments."[111]Finally, and most importantly, the applicability of the guidelines was extended to extraterritorial activities of TNCs, which are the ones performed outside their home territories.[112]Therefore, the guidelines now cover, for example, activities of an Indian subsidiary of an American business enterprise.

Goals of the OECD Guidelines

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The basic objective of OECD guidelines is to understand and to help governments respond to new developments and concerns, such as corporate governance, the information technology and environmental matters. This Guideline is part of the OECD Declaration on International Investment and Multinational Enterprises, which is aimed at promoting and protecting foreign direct investment.[113]

Contents of the OECD Guidelines

The latest version of the guidelines covers a broad scope of TNCs activities and is divided into the following chapters:

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[111] *Ibid.*, Chapter II.10.

[112] The OECD Guidelines state: "Governments adhering to the guidelines encourage the enterprises operating on their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.", *OECD Guidelines (2000)*, Chapter I, art. 2.

[113] OECD Guidelines (2000), *available at*
<http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter *OECD 2000 Guidelines*];
Principle of national treatment for foreign-owned enterprises:

- Co-operation among adhering governments in order to avoid conflicting requirements on multinational enterprises;
- Co-operation among adhering governments with regard to international investment incentives and disincentives.

a. Concepts and Principles

The first chapter includes introductory paragraphs that state the purpose, nature and scope of the guidelines.[114]It explains that the guidelines are voluntary and not legally enforceable recommendations addressed by governments to multinational enterprises.[115]This chapter also includes a definition of a multinational enterprise and clarifies that the guidelines are not aimed at distinguishing between domestic and multinational enterprises.[116] The guidelines should apply to multinational as well as domestic enterprises.[117]However, the guidelines acknowledge that small- and medium-sized enterprises do not always operate with the same capacities as larger businesses.

b. General Policies

The second chapter encourages enterprises to comply with policies of host countries and to respect interests of other stakeholders.[118]To reach this goal, the chapter further states general principles that should be followed by multinational enterprises.

c. Disclosure of Information

The third chapter encourages enterprises to disclose "timely, regular, reliable and relevant information" regarding their activities, structure, financial situation and performance.[119]The chapter further lists what kind of basic and additional information enterprises should disclose.

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[114] OECD Guidelines (2000), at Chapter I.

[115] *Ibid.*, Chapter I.1.

[116] "A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed." *OECD 2000 Guidelines,* Chapter I.3.

[117] *Ibid.*, Chapter I.4.

[118] *Ibid.*, Chapter II.

[119] *Ibid.*, Chapter III.

d. Employment and Industrial Relations

The fourth chapter covers numerous labour rights to be respected by enterprises with regard to employment and industrial relations. This includes the right of their employees to be represented by trade unions and other bona fide representatives, abolition of child labour, eliminations of all forms of forced or compulsory labour, prohibition of discrimination against their employees, providing necessary facilities and information to employee representatives, promotion of co-operation between enterprises and employees and their representatives.[120]

e. Environment

Enterprises should take into account "the need to protect the environment, public health and safety [and] to conduct their activities in a manner contributing to the wider goal of sustainable development."[121]To reach this goal, the guidelines encourage enterprises to engage in numerous activities, such as establishing and maintaining an appropriate system of environmental management, providing the public and employees with adequate and timely information on environment, health and safety impacts of their activities, providing adequate education and training to employees in environmental, health and safety matters.[122]

f. Combating Bribery

The sixth chapter deals with the prohibition of bribery. In order to eliminate bribery, enterprises should avoid paying any portion of a contract payment to public officials or the employees of their business partners, ensure appropriate remuneration of their agents, enhance the transparency of their activities, promote employee knowledge of and compliance with their anti-bribery and anti-corruption policies, adopt management control systems discouraging bribery and corruption, and avoid illegal contributions to candidates for public office or to political parties.[123]

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[120] *Ibid.*, Chapter IV.

[121] *Ibid.*, Chapter V.

[122] *Ibid.*,

[123] *Ibid.*, Chapter VI.

g. Consumer Interest

To ensure protection of consumer interests, enterprises should follow fair business, marketing and advertising practices and should ensure the safety and quality of their products or services. This chapter further includes numerous particular recommendations that should be followed by enterprises in order to reach the general goal of protecting consumer interests.[124]

The other chapters of this guideline are related with Science and Technology; *Competition and Taxation.*

Institutional Framework

The institutional set-up for implementation procedures on the guidelines consists of three main elements: National Contact Points (NCPs); the OECD's Committee on International Investment and Multinational Enterprises (CIME); and the advisory committees of business and labor federations (Business and Industry Advisory Committee – BIAC; Trade Union Advisory Committee – TUAC and NGOs represented by OECD Watch).[125]NCPs play the most important role in the implementing process. They are set up by the adhering countries and are aimed at promoting the guidelines and handling enquiries and discussions of concerned parties.[126] NCPs are required to meet and report to the CIME every year.

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[124] *Ibid.,* Chapter VII

[125] *See* Organization for Economic Co-operation and Development, Implementation of the OECD Guidelines for Multinational Enterprises, *at* (Procedural Guidance) <http://www.oecd.org/document/43/0, 2340, en_2649_34889_2074731_1_1_1_1,00.html> The implementation of the Guidelines is covered in a separate document – Decision of the OECD Council with an attachment on procedural guidance for NCPs and the CIME. The Council's Decision sets up main responsibilities of NCPs and the CIME with regard to the Guidelines implementation. *available at* http://www.oecd.org/dataoecd/56/36/1922428 .pdf

[126]OECD Council Decision (June 2000), (hereinafter *OECD Council Decision*); OECD. *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>(last visited July 1, 2005)Chapter I.1.

The establishment of NCPs represents a unique way of implementing an international instrument. However, the implementation system does not have sufficient tools enabling an effective implementation of the guidelines. NCPs do not have an obligation to make the results public.[127] CIME functions as the ultimate body responsible for implementation of the guidelines. Its responsibilities include: issuing clarifications on the guidelines; organizing discussions on issues related to the Guidelines, and reporting to the OECD Council with regard to the guidelines.[128]

The guidelines are undoubtedly a significant effort in establishing international standards to regulate TNCs conduct. However, they suffer from several disadvantages. Firstly, although the guidelines mention in the preface some major international instruments, they do not expressly state that multinational enterprises are obliged to respect the principles included in these instruments.[129]Further, NCPs are not obliged to make the results of complaint procedures public, which substantially weakens the efficiency of the Guideline's implementation. Finally, the guidelines represent an international instrument of entirely voluntary nature, which is emphasized in the guidelines themselves, and therefore it can hardly serve as a guarantee of TNCs compliance with international standards.[130]

3.3. The WTO System

The World Trade Organisation (WTO) is an international organisation that sets the rules for the international trading system and adjudicates disputes relating to these rules. 151 nations are members of the WTO. It has an established powerful dispute settlement mechanism. It has the potential to provide an enforcement mechanism for human rights, which has been demanded by some. WTO has no specific provision to impose legally binding orders directly on TNCs. This problem could theoretically be met by holding the state responsible for the violations of its TNCs. But in practice due to the pressure of home country of TNCs or pressure or influence of TNCs themselves

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[127] *Procedural Guidance, supra* note 125, Chapter I.C.4.b.

[128] Ibid., Chapter II.4, 5, 7.

[129] Oldenziel, Joris and Bohman, Anna (2004), supra note 105, p. 5-6.

[130] Observance of the Guidelines by enterprises is voluntary and not legally enforceable." *OECD 2000 Guidelines,* Chapter I.1.

or states as host countries are not be able to regulate and control the violation of the TNCs. The **second** problem is the mandate of the WTO. The WTO's mandate is to ensure that trade flows as smoothly, predictably and freely as possible. It does not include human rights provisions. But it is submitted that the free market or status-quo situation is always in favour of dominant class.

Article XX of the GATT provides that restrictive measures can be taken.[131] Article XX (e) laid down that the agreement shall not prevent a member state from taking measures against products that were produced by prison labour. Article XX (b) allows trade barriers necessary to protect human, animal or plant life or health. At the present time, however, Article XX (b) is only applied to restrict the importation of final products that expose domestic populations to health risks.[132] Article XX (a) allows trade barriers necessary to protect public morals. The WTO might have a levelling effect on some global labour standards, but the WTO at its present state cannot be seen as viable path to enforce human rights violations against TNCs. Also, the incentives for using a trade barrier in the WTO seem small, since the country might risk being the subject to scrutiny of its human rights situation and it could be subject to retaliatory measures and political pressure. It is submitted that WTO is not concerned with trade not social responsibility. In 350 panel decisions the term "human rights" was mentioned in only 20 documents, mostly in irrelevant consideration and not as part of the panel decision.[133]

3.4 BITS/MIAs

Globalization, the rapid pace of technological advances, and the liberalization of government laws and practices each have contributed to the dramatic increase in the flow of cross-border investments in the past ten years. Despite the large and growing importance of foreign direct investment (FDI), the international legal

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[131] General Agreement on Tariffs and Trade (GATT 1947), October 30, 1947, 55 UNTS 194.

[132] "Thailand-Restrictions on Importation of and Internal Taxes on Cigarattes", Report of the Panel, 'GATT BISD (37th Supp), WTO (1996).

[133] ICSID database 'WTO-DEC' on Westlaw on September 7, 2007.

investment framework is highly fragmented.[134] The number of international investment agreements has increased sharply after globalisation.

Another 60 or so agreements are currently under negotiation process. Foreign direct investment is legally protected on the national (domestic) level and on the international level. The protection of FDI in international law includes customary international law, multilateral treaties and bilateral treaties. Bilateral treaties can be directly concluded between an investor and a state (investor-state contracts) and between two states (for instance through Bilateral Investment Treaties, BITs).[135] The first BIT has concluded between Germany and Pakistan in 1959. The number of such treaties has risen to the impressive number of more than 2700 in 2010. The importance of BITs was originally reflected in Asian African Legal Consultative Committee (AALCC) which published a model treaty with two variants in 1984. Role of BITs may be found in the Lome Conventions which show that the Contracting parties attach considerable importance to the conclusion of bilateral investment treaties.[136] U.S. BITs incorporated as the principal test of nationality of a company. For example the 1993 treaty between the U.S. and Ecuador provides that:

> "Company" of a party means any kind of corporation, company, association, partnership or other organisation, legally constituted under the laws and regulations of a Party or political subdivision thereof...[137]

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[134] Brunner, Serge and Folly, David (2007), "The Way to a Multilateral Investment Agreement", *NCCR Trade Working Paper, 2007/24*, p. 1.

[135] Sasse, Jan Peter (2011), *An Economic Analysis of Bilateral Invest Treatie,'* Netherlands: Gabler Verlag Press , at p. 40

[136] Rudolf, Dolzer and Stevens, Margrete (1995), *ICSID Bilateral investment treaties,* Martinus Nijhoff Publishers, p.6, Article 258 of the Lome Convention acknowledges that the promotion of private investment would need to include binding obligations to: (a) accord fair and equitable treatment to such investors; (c) take measures and actions which help to create and maintain a predictable and secure investment climate as well as enter into negotiation on agreements which will improve such climate.

[137] *U.S.-Ecuador BIT* (1993), at art. I(1)(b).

After adopting liberal economic policy India started a continuing program of signing bilateral investment promotion and protection treaties with a large number of countries. These treaties are generally known as India's BITs (Bilateral Investment Treaties). India's first BIT was signed on March 14, 1994 with the U.K., which entered into force on 6 January 1995. This BIT has served as India's model BIT for its future negotiations. It is the foundation of almost all of India's BITs. The U.K model BIT itself was created in the mid-1970s as a response to threats of nationalisation under doctrines of the New International Economic Order.[138] India has signed more than 70 BITs. The first common feature of India's BITs is that they apply only once a protected investor has established a qualified investment. The BITs do not apply to the acquisition or establishment of the investment. This is termed the "post-entry model." In the second instance, India's BITs apply to individuals and legal persons. In all of the BITs, individual nationals or citizens are covered. In addition, in some BITs, India extends its obligation of protection to permanent residents of its co-contracting State. In the third place, India's all BITs provide that they apply to existing and future investments as on the date of entry into force of BITs. Many of India's BITs apply to disputes, which arose which existed prior to their entry into force.[139]

The BITs with Austria and Finland are unique in their strong suggestion that they do not apply to pre-dating disputes by stating that they do not apply to "settled claims or procedures initiated prior to entry into force" of the treaty. As a final matter on the limitations of India's BITs, the BIT with Russia is the only one, which excludes regulatory subject-matter from the scope of the treaty.[140] This BIT provides that it shall not apply to matters relating to taxation.

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[138] Walter, Dr Andrew (2000), "British Investment Treaties in South Asia: Current Status and Future Trends", *Report of International Development Centre of Japan,* January (2000), p.3.

[139] Patel, Bimal N. (2008), *India and international law,* Volume 2, The Hague: Martinus Nijhoff Publishers, p. 304.

[140] Ibid., p. 304.

Multilateral Investment Agreements (MIAs)

The MIAs provides a very useful tool to reveal as which issues became generally accepted during the negotiations and which issues remain controversial. MIAs is a starting point from which to analyse the economic potential of an multilateral investment agreement and to identify the most significant potential deadlocks.[141] The purpose of the negotiations was to establish worldwide rules for investment, similar to the rules for trade within the GATT and WTO. The Multilateral Investment Agreements (MIAs) represented the most recent attempt to standardize international investment provisions. On May 25, 1995, Ministers of OECD launched a negotiation for a Multilateral Agreement on Investment (MAI).[142] The statement by the Ministers identified three major pillars: a broad multilateral framework of rules for investor protection, the liberalization of investment regimes, and effective dispute settlement procedures. The OECD commenced negotiations aimed at creating a Multilateral Agreement on investment (MIA) which would:

> "provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures; be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries, which will be consulted as the negotiation progress."[143]

Furthermore, specific rules for investment and liberalization of restrictions would promote competition and economic efficiency across and within markets, encourage a broader dispersion of technology and capital, and enhance economic

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[141] Serge Brunner and David Folly (2007), supra note 134, p. 3.

[142] Wallace, Cynthia Day (2002), *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*, The Hague: Martinus Nijhoff Publishers, p. 1136.

[143] Meeting of the OECD Council of Ministrial Level, OECD Press Release, SC/Press(95)41, at 3 (May 24, 1995) also Terence P. Stewart, 'The GATT Uruguay Round: a negotiating history (1986-1994), Vol. IV: The End Game (Part 1), p. 436.

growth and a higher standard of living worldwide.[144] Consumers would benefit directly from increased quality, wider choice, and lower prices on goods and services. Producers, who in today's global economy have no choice but to compete abroad, would benefit from a level playing field. Globalization, the rise of international investment and increasing the number of providers and recipients of international investment are some reasons for the vast development of MIA.

Key Features of the MAI:

To realize the full potential of investment flows, the rules must be as comprehensive as possible[145]:

- All laws, regulations and procedures should be transparent and available to the public;
- The rules should reach virtually every type of asset: plant inventory, financial assets, intellectual property, etc.
- The MIAs should provide for national treatment (i.e., policy treatment that is no worse than it is for domestic competitors to ensure a "level playing field").
- All foreign investors should be treated the same by the host government (i.e., MFN treatment).
- Investors need the right to seek to minimize confiscatory and complex tax regimes that can impede and distort investment decisions.
- Investors need the flexibility to move key personnel and their families to any of their facilities without incurring cumbersome immigration requirements.
- MAI should have a provision on transfers to respond to market demands and deploy financial resources quickly, flexibly, and to adjust them when necessary.
- Investors should have protection against arbitrary seizures by governments. MAI should contain a provision on expropriation consistent with international legal standards.
- Investors need to be assured that their investments will not be held hostage to the host government that seeks to enforce its laws extra territorially.

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[144] Canner, Stephen J. (1998), "The Multilateral Agreement on Investment", 31 *Cornell Int'l L.J.*, pp. 657-681, p. 657.

[145] U.S. Council for International Investment, 'A Guide to the Multilateral Agreement on Investment (1996).

International investment flows will continue to increase and serve as an engine of growth for developed and developing countries. The question is on what terms this investment will take place: on a rule-based system that establishes transparency, clarity and freedom to compete on the basis of their offering or on a system with no rules that enables governments to protect their domestic markets. The later will be for the beneficial to whom who are the better bargaining position.

3.4. Corporate Code of Conduct

Corporate activities that harm the environment, violate labour and human rights, corrupts state actors and institutions remain problems in all global economies.[146] Domestic as well as international regulatory systems can do the work of protecting the environment, worker rights, ensure that human rights are upheld and corruption prosecuted. The new phrase became the "triple bottom line" (People, Plane and Profit) of economic, social and environmental outcomes.[147] In this context the recent wave of voluntary codes of conduct; US companies began introducing such codes in the early 1990s. This practice spread to Europe in the mid-1990s where companies undertake external audits to verify the adequacy of their practices in a variety of areas of social concern. Voluntary codes of conduct range from vague declarations of business principles applicable to international operations, to more substantive efforts at self-regulation. They tend to focus on the impact of TNCs in two main areas: social conditions and the environment. A variety of stakeholders, including international trade union organizations, environmental NGOs and the corporate sector itself have played a role in the elaboration of codes of conduct for a variety of initiatives ranging from voluntary codes of conduct.[148] Companies can undergo external audits to verify the adequacy of their practices in a variety of areas of social concern. These initiatives are consistent with the broader trend in regulatory

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[146] McInerney, Thomas F. (2005), "Putting Regulation before Responsibility: The Limits of Voluntary Corporate Social Responsibility", Voices *of Development Jurists*, Volume II No. 3, pp. 1-44, p. 7.

[147] Poel, Ibo Van De and Royakkers, Lamber (2011), *Ethics, Technology, and Engineering: An Introduction,* Wiley-Blackwell, p. 54.

[148] Jenkins, Rhys (2001), *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, United Nations Research Institute for Social Development, (April 2001), p. iii.

policy away from so-called "command–and-control" regulatory techniques and towards voluntary firm-level self-regulation and self-policing of voluntary Corporate Codes of Conduct (CCC).

The idea was a pragmatic response as well as a realization that traditional regulation was ineffective and had generated unintended consequences. Throughout the OECD, regulators no longer see companies strictly in adversarial terms but rather recognize them as important partners in achieving regulatory objectives. As a result, firm-level self-regulatory measures have grown in importance. The regulatory strategy of voluntarily CCC provides incentives for firms voluntarily to implement compliance systems and sanction firms that lack such systems.[149] There is widespread agreement that declining state resources, growth in the number of regulated entities and complexity of business, and the inefficacy of traditional command-and-control regulation require regulators to leverage the resources of private entities in pursuing regulatory objectives. These approaches afford companies greater latitude in achieving compliance; companies can satisfy regulatory requirements provided they adopt the proper *processes* for addressing a particular regulatory issue. This approach has its shortcomings, however, as many observers have noted that companies can have the correct process in place while failing to achieve substantive performance criteria.

British Petroleum's Code of Conduct

The BP code of conduct emphasises on his fundamental commitment – to comply with all applicable legal requirements and the high ethical standards set out in this code – wherever we operate. To help us meet this commitment, the code defines what BP expects of its businesses and people regardless of location or background. It provides both guidance in key areas and references to more detailed standards, instructions and processes for further direction."[150]

[149] Ibid., p. 20.

[150]British Petroleum's Code of conduct, (2005) 'Our commitment to integrity', p.4.

Critique of Voluntary Corporate Codes of Conduct

In light of above, it is necessary to undertake a critical examination of voluntary corporate codes of conduct. First, even if norms such as protecting the environment or human rights generally are valued, taking a purely voluntary approach to promoting compliance with such norms will produce only few results. Second, it is argued that notwithstanding the presumed international dimension of voluntary Corporate Codes of Conduct (CCC), control of individual business firms is generally the province of states. Third voluntary regulatory programs undermine development priorities, including strengthening domestic governance, insofar as domestic regulatory institutions fail to develop the capacity to protect their citizens.[151] Finally, a more robust model of regulation complements efforts to transcend the neoliberal model of the state by providing a positive role for the state in driving economic development.

a. Generating Compliance

Voluntary CCC proponents use economic incentives as the basis generating compliance with CSR norms. For the most part, these economic incentives and disincentives are linked to corporate reputation. Thus, CCC supporters maintain that firms respond to CSR-related concerns as a result of the self interested goal of boosting their reputations with consumers, trading partners, and investors. A good reputation will translate into improved sales and profitability or higher stock price, while a bad reputation will have the opposite effect. Consumer pressure imposed on companies such as Nike for its reportedly abusive labour practices, or Shell for its failure to intercede on behalf of Ken Saro Wiwa. Following logic are given for firms to act in socially responsible manner in order to maintain positive reputations among the public.

1. Firms will choose to do what is economically in their best interests.
2. Acting in a socially responsible manner clearly inures to their economic benefit.
3. Therefore, firms will follow social responsibility norms.

[151] McInerney, Thomas F. (2005), supra note 146, p. 22.

As the following analysis of regulation and compliance shows, this logic is fundamentally mistaken. If CSR was intended to correct market failure, does it make sense to rely exclusively on market forces as the solutions?[152]

b. Pragmatic Justifications

Promoting voluntary CCC for regulation in developing countries rests on utilitarian or pragmatic justifications. Proponents reason that many states are unable to fulfil their obligations to enforce international or domestic legal norms, and thus the international community must create some alternative system to prevent inappropriate practices. Such a view focuses solely on outcome-oriented values while ignoring process-oriented. In many developing countries, state structures are weak. Poor enforcement authorities hinder vigorous litigation. Corruption distorts state functions. Despite the prevalence of these phenomena, many developing countries are trying to improve state performance.[153] The enforcement of norms relating to corporate social responsibility thus constitutes an important part of the state alongside the development of the market.

c. **Beyond Economic Approach**

Power to control (i.e., regulate) socially harmful practices to the private sector through CSR initiatives effectively undermines the development of state capacity not only to regulate but also to expand the domestic economy and mitigate social harms. An improved economic understanding of the role of the state, as opposed to the market, sees the need for a strong state capable of investing to promote growth, rather than a weak state buttressed by regulatory forces that operate independent of its authority. Only strong state institutions can promote economic growth and reduce negative externalities.

There are many shortcomings in voluntarily through codes of conduct and self-regulation. The nation or international community cannot impose any legal accountability on the basis of violation of self regulation. There are a number of

[152] Ibid., p. 23.

[153]Ibid., p. 31.

potential advantages to the legal approach. The International Council on Human Rights Policy pointed out:[154]

> *Voluntary codes rely entirely on business expediency or a company's sense of charity for their effectiveness. By contrast, legal regimes emphasize principles of accountability and redress, through compensation, restitution and rehabilitation for damage caused. They provide a better basis for consistent and fair judgments for all parties, including companies.*

From UN Draft Codes of Conduct to Corporate Code of conduct, after examining the different codes, guidelines, norm, rules, it may be submitted that these guidelines and norms are either recommendatory in nature and impose the obligation on state or voluntarily and minimal accountability. There is no any an existing binding legal code or rule in international regime which can directly make responsible to these gigantic and powerful corporations. In existing situation these corporations are basically regulated either by domestic law or BITs/MIAs. Through dispute settlement mechanism, the activities and behaviour of TNCs are controlled. International organisation, International arbitration, ICSID and Domestic court, through judgement or award of the case, have established the rule or guidelines which impose obligation on TNCs. Under next chapter it is necessary to discuss the emerging jurisprudence related to regulation of TNCs activities and struggle between TNCs and Global Community.

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[154]International Council on Human Rights Policy (2002), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies,* Switzerland: International Council on Human Rights Policy, p. 5.

CHAPTER 4

REGULATION OF TNCS: EMERGING JURISPRUDENCE

CHAPTER 4

REGULATION OF TNCs: EMERGING JURISPRUDENCE

There is no doubt that, like other actor in an international community, TNCs can do any act. They exert increasingly global influence and power, and can influence the outcomes of global inter-governmental meeting and drafting of global agreements. Malcom Fraser rightly held "governments are being downsized while global corporations are growing ever larger and more powerful."[1] Governments either have already lost the ability to regulate the behaviour of corporations or they are losing. In the process of globalisation the sovereign states become weak. In international law primary responsibilities to settle the dispute is on host countries. Foreign investor does not believe on dispute settlement mechanism of host states and they tries to make provision in Bilateral or Multilateral Investment Treaties (BITs/MITs) for settlement of disputes.

Disputes, in international relations especially economic relations, are bound to arise which require settlement mechanisms to ensure their effective resolution. These disputes are often resolved by two basic techniques of conflict management: diplomatic procedures and adjudication.[2] When a commercial function is performed by the State any disputes which arise are likely to be referred either to the courts of

[1]Malcom Fraser, Australian Prime Minister, in Deakin Lecture on "My Country 2050" suggested "There is a paradox here because modern economic theories are suggesting that the nation state will become increasingly irrelevant and that the economics of globalisation will be all powerful. If globalisation really means that geography will cease to have any meaning there will be broad political consequences. Wealthy countries, whose countries will house the headquarters and control of most corporations, will cease to have much interest in the political structure or stability of a particular country. If globalisation is fully successful, they would argue that their control through corporations is sufficient. If this were to be true, it underlines the need for Australia to build her own strength ever more vigorously." (http://www.abc.net.au/rn/deakin/stories/s299081.htm).

[2]Shaw, Malcolm N (2008), *International Law*, New York: Cambridge University Press, 6th ed., p. 1011

the State concerned or to international commercial arbitration. Generally the private party prefers arbitration as it is a 'neutral' process.[3]

If multilateral institutions and trading regimes are the architects of globalization, the TNCs are both its engineers and prime beneficiaries. TNCs are operating in almost every country worldwide, through foreign direct investment, mergers and acquisitions of local companies, the expansion of foreign-based subsidiaries, and joint-venture agreements with local firms.[4] Although these TNCs operate in the sovereign jurisdiction of states, but host-states, because of inequities in bargaining power, are not capable either of adequately policing TNC activity regarding human rights issues, or of ensuring that the rights of the wider panoply of stakeholders are protected.[5]

4.1. International Arbitration

Arbitration is one mode of dispute resolution that became very popular in international economic dispute resolution. By the beginning of the 20th Century, proposals for more universal state-to state arbitration mechanisms became credible.[6] The Hague Peace Conference produced the Hague Convention of 1899 on the Pacific Settlement of Dispute, which included chapters on international arbitration.[7] These provided the foundation for inter-state adjudication in the Permanent Court of International Justice, International Court of Justice and the founding of the Permanent Court of Arbitration to administration state-to-state arbitrations under the Convention.

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[3] Tondapu, Gautami S. (2010), "International Institutions and Dispute Settlement: The Case of ICSID", *Bond Law Review,* Vol. 22, Art. 4, pp. 81-94, p. 81.

[4] Pillay, S. (2004), "*AND JUSTICE FOR ALL*? Globalization, Multinational Corporations, and Need for Legally Enforceable Human Rights Protections", *U. Det. Mercy L. Rev.*, Vol. 81, pp. 489-523, p. 497.

[5] Ibid., p. 499.

[6] Orlu Nmehielle, Vincent O. (2001), "Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)", *Annual Survey of International & Comparative Law*, Vol. 7, Issue.1, Art. 4, pp. 21-48, p. 22.

[7] 'Convention for the Pacific Settlement of International Dispute', (First Hague Conference, 1899) Arts. 15-29 (www.pea-cea.org).

Arbitration remained a preferred method of resolving inter-state disputes in preference to standing international judicial bodies.[8]

The driving force behind these various developments was the international business community, the principal user of the arbitral process, to promote international trade and investment by providing workable, effective international dispute resolution mechanisms. The first international commercial arbitration treaty in the modern era was the Montevideo Convention, signed in 1889 by various Latin American states. After Montevideo Convention, the Hague Convention of 1899 on the Pacific Settlement of dispute and the Hague Convention of 1907 on the Pacific Settlement of International dispute for the Settlement of Inter-state disputes by arbitration.[9] The basic objective of the international arbitration is to interpreting and giving appropriate effect to such agreements or bilateral or multilateral treaties.

***Trail Smelter Arbitration Case* (1938)**[10]

The *Trail Smelter arbitration*, the first and one of the most cited cases in international environmental law, focused basically the state responses to transboundary harm. The subject matter of the dispute did not directly concern the two governments; nor did it involve claims by U.S. citizens against the Canadian government. It consisted, rather, of claims based on nuisance, alleged to have been committed by a Canadian corporation and to have caused damage to U.S. citizens and property in the State of Washington.[11]

The case concerned tranboundary pollution caused by industrial fumes from a Canadian smelter located near the international boundary with the United States. Trail, a place in British Columbia near Columbia River, flowed past a smelter located in a gorge. Zinc and lead were smelted in large quantities at the smelter. The distance

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[8]Charney, J.I. (1998), "Third Party Dispute Settlement and International Law", 36 *Colombia J. Transnational Law,* 65-90, p. 68.

[9] Convention (1899), supra note 7, Art 24.

[10] *Trial Smelter Arbitral Tribunal Decision*, April 16, 1938 and *Trail Smelter* Arbitral Tribunal March 11, 1941, Decision (http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf).

[11]Read, John E. (1963) "The Trail Smelter Dispute", 1 Canadian Year Book International Law, pp. 213-229, p. 214.

from Trail to the boundary line is about seven miles in a straight line or eleven miles along the course of the river. In addition to intermittent smelting and mining operation, the region was noted for its lumber industry and forming. The Trail Smelter began operation in 1896 under the US auspices but was later acquired by the Consolidated Mining and Smelting Company of Canada Ltd and eventually became one of the largest and best equipped smelting plants on the continent.[12]

By 1930, about 300 to 350 tons of sulphur was being emitted daily. Initially, various complaints were made by farmers in the northern part of Stevens's Country which were settled. In 1928, the two governments agreed to refer the matter to the international joint commission, which had been set up under a 1909 Convention between US and Canada.[13] In 1931, the Commission issued its report to the relevant authorities, stating that serious damage was caused in the territory of the US and the indemnity Canada should pay to compensate US interests was US$350,000. In 1933, dissatisfied with the continuing damage, the US renewed the negotiations with Canada, which led to the conclusion of the 1935 Convention for the Settlement of Difficulties arising from operation of Smelter at Trail, BC (the "1935 Convention). A tribunal was established and was requested to determine the following questions[14]:

1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and so what indemnity should be paid there for?
2. In the event of the answer to the first part of the proceeding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?
3. In the light of the answer to the proceeding Question, what measure or regime, if any, should be adopted or maintained by the Trail Smelter?
4. What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two proceeding questions?

In the first decision the Tribunal held that damage was caused by the Trail Smelter in the State of Washington between 1932 and 1937. Canada was to identify

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[12] *Trial Smelter Decision* (1938), supra note 10, p.1945.

[13] Treaty Relating to Boundary Waters and Questions arising along the Boundary between the US and Canada (Washington, January 11, 1909), TS No. 548.

[14] *Trial Smelter Decision* (1938), supra note 10, p.1908.

the US in the amount of US$78,000.[15] Canada paid this amount and the US accepted it without reservation. In its final decision, delivered on 11 March 1941, the Tribunal affirmed the previous decision[16] In the event of any possible damage, nevertheless, it decided that indemnity as well as reasonable costs of investigation of up to US$7,500 in any one year should be paid to the US.

On the question of whether the Trail Smelter should be required to refrain from causing future damage in the State of Washington, the Tribunal expressed the following opinion:

> "Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[17]

The trail smelter Arbitration remains one of the early cases frequently cited in support of the proposition that States are obliged under general principles of international law to compensate other countries for damage arising from air pollution caused by their activities.

Effect of Trail Smelter Case

Trail Smelter clearly speaks to the public, state-oriented dimension of transnational responsibility, but it also gave birth of private law through the potential and the promise of private responsibility. So this case is interested in the law-making dimension of corporate social and environmental responsibility (CSR) - in the regulatory context and in the political economy of CSR.[18] To understand the regulatory dimension of the Firm's responsibilities to society at large it is necessary to explore the changing dimensions of public, state-cantered regulation, look to the

[15] Ibid., p. 1933.

[16] Ibid., p. 1980.

[17] Ibid., p. 1965.

[18] Zumbansen, Peer (2006), "The Conundrum of Corporate Social Responsibility: Reflections on the Changing Nature of Firms and States", *CLPE Research Paper,* Vol. 2 No. 01, pp. 1-21, p. 15.

corporation itself, to its role and function in a dramatically changing globalised socio-economic environment.

Corporate Social Responsibility (CSR) debate has three connected discourses that concern the themes of environmental regulation through 'hard' and 'soft' law as well as the transformation of the regulatory state into a supervising and moderating state into a supervising and moderating state in the knowledge economy. The third discourse that need to explore concerns the domestic and transnational, regulatory framework and context of corporate activity, but also the norms internal to the organisation and governance of business corporation. Taken together, these discourses inform any assessment of the corporation's larger social, political and environmental responsibilities.[19]

4.2 ICSID Tribunal: Case related to Investment

Investment can be made in a wide range of sectors and can take many different forms. Hence investment disputes can also cover a wide range of investment activities.[20] In addition to investment disputes, environmental, human rights and labour-related issue, through little, are also taken into consideration by these arbitrations. It is not impossible for the BITs/MITs, made for the protection of investment, to make provisions to other issues i.e. human rights but the model BITs such as China (2003), United States (2004), Germany (2005), United Kingdom (2005), France (2006) and MITs such as North American Free Trade Agreement (NAFTA) and Energy Charter Treaty (ECT) do not mention them.[21] The International Centre for Settlement of Investment Disputes (ICSID) also does not make any provision regarding human rights.

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[19] Ibid., p. 15.

[20] Kriebaum, U. (2007), "Privatizing Human Rights: The Interface between International Investment Protection and Human Rights" in A Reinisch and U Kriebaum (eds), *The Law of International Relation*-Liber Amicorum Hanspeter Neubold, pp. 165- 189, p. 166.

[21] Dolzer, R. and Schreuer, C. (2008), *Principles of International Investment Law*' Oxford: Oxford University Press, p. 314.

ICSID is established by the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). This convention was prepared by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). On March 18, 1965, the convention was submitted, with an accompanying Report, to member governments of the World Bank for their consideration with a view to its signature and ratification[22]. After ratified by 20 countries the convention entered into force on October 14, 1966. There are currently 157 signatory States to the ICSID Convention. Of these, 147 States have also deposited their instruments of ratification, acceptance or approval of the Convention.

ICSID Convention makes provisions for conciliation and arbitration of investment disputes between Contracting States and individuals of other Contracting States. ICSID tribunals have a general obligation to 'deal with every question submitted' to them and to state the reasons upon which they base their decisions[23]. The general picture is that ICSID tribunals made an effort to address all arguments raised by the parties to the dispute. But this does not prevent tribunals from exercising judicial restraint by avoiding dealing with issues that can be left aside as a consequence of conclusions on other issues.

Metalclad Corporation vs. Mexico (2001)[24]

In 1993, Metalclad Corporation purchased the Mexican company[25] in order to build and operate a hazardous waste transfer station and landfill in Guadalcazar, San Luis Potosi. Metalclad began construction of the landfill in May 1994. In October, the municipality of Guadalcazar ordered that construction stop because no municipal construction permit had been issued. In November, Metalclad and the federal government entered an agreement for operation of the landfill and an environmental audit and for the conservation of endemic species. The governor of San Luis Potosi, however, opposed the agreement, and in December, the municipality denied

[22] ICSID Convention 1965, Regulations and Rules, 15 April 2006

[23] ICSID Convention, 1965, Article 48(3).

[24] *Metalclad Corporation vs. Mexico (2001,)* ICSID Case No. ARB(AF)/97/1. 40 ILM 36 (2001),

[25] The name of Mexican company is Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (COTERIN)

Metalclad's application for a construction permit. Metaclad alleged that Mexico, through its state and local governments, violated North American Free Trade Agreement's (NAFTA) Article 1105, which requires parties to treat investments "in accordance with international law, including fair and equitable treatment and full protection and security." It also alleged violations of the compensation requirements of Article 1110. Metalclad sought approximately U.S. $90 million for the violations.

The arbitral tribunal based the award under chapter 11 of the NAFTA,' found that the lack of transparency in Mexico's regulatory requirements constituted a denial of fair and equitable treatment. The tribunal held that Mexico was responsible under NAFTA for the acts of San Luis Potosi and Guadalcazar. The tribunal lay down that on three breaches of Articles 1105 and 1110 of the NAFTA. The first two breaches were based on a concept of transparency.[26] The Tribunal interpreted transparency as imposing two related obligations:

1. All relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.[27]
2. Once the authorities of the central government of any Party ... become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant law.[28]

The Tribunal reasoned that Metalclad was entitled to rely upon the representations of federal government that no local construction permit was necessary, and that municipality would have no legal basis for denying the permit. It held that even if a municipality permit was required under Mexican law, the municipality only had authority over matters related to physical construction or defects in the site.[29] The tribunal also found that Mexico's actions violated the

[26] *Metalclad Case* (2001), Supra 24, p. 46.

[27] Ibid., p. 47.

[28] Ibid., p. 47.

[29] Ibid., p. 86.

expropriation provision.[30] Municipality acted outside its authority and Metalclad reasonably relied on Mexican federal government, Mexico must be held liable for his default.

The third breach was based on ecological assessment.[31] The Tribunal make liable the municipality for its delay in asserting the need for a municipal permit and for denying that permit on environmental grounds.[32]

> "The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA."[33]

The Tribunal further held that Guadalcazar's conduct constituted an expropriation in violation of Article 1110. It observed that:

> "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property....but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[34]

The Tribunal held that by permitting Guadalcazar's unfair and inequitable treatment, Mexico had "taken a measure tantamount to expropriation".[35] Since Metalclad had completely lost its investment the tribunal awarded Metalclad U.S. $

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[30] Ibid., p. 103. That provision prohibits 'not only open, deliberate and acknowledged taking of property, such as outright or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State

[31] Ibid., p. 48.

[32] Ibid., p. 86-87, 90-93.

[33] Ibid., p. 49.

[34] Ibid., p. 50.

[35] Ibid., p. 50.

16.7 million, Metalclad's investment in the project and interest 6 percent interest from the date that Guadalcazar denied the municipal construction permit.[36]

On Mexico's application to set aside the award, the Supreme Court of British Columbia held that the Tribunal's finding of unfair and inequitable treatment based on a lack of transparency went "beyond the scope of the submission to arbitration because there is no transparency obligations contained in Chapter 11.[37] On the question of expropriation prior to the Ecological Decree, Justice Tysoe held that the award could be sustained, however, on the ground that the Ecological Decree itself constituted an expropriation.[38] He noted that "the Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110."[39] But he also observed that "the definition of expropriation is a question of law with which this Court is not entitled to interfere under the International Commercial Arbitration Act."[40] In this way the court rejected Mexico's argument. Mexico filed a notice of appeal to the British Columbia Court of Appeal at the end of May, 2001. Parties, before starting proceeding, reached a preliminary agreement in June to settle the case for $15,626,260.[41]

***Emilio Agustín Maffezini vs. The Kingdom of Spain* (2000)[42]**

In 1989, Mr. Emilio Agustín Maffezini through a company named Emilio A. Maffezini S. A. (EAMSA) decided to embark on the production of various chemical products in Galicia, Spain. He took support of *Sociedad para el Desarrollo Industrial de Galicia* (SODIGA), a Spanish entity.[43] Given the nature of the project proposed, an

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[36] Ibid., p. 54.

[37] Mexico v. Metalclad Corp., 2001 B.C.S.C. 644 (B.C. Sup. Ct. May 2, 2001), para 72. <http://www.courts.gov.bc.ca> [hereinafter Supreme Courtjudgment].

[38] Ibid., para. 81-105.

[39] Ibid., paras. 90.

[40] Ibid., paras. 99.

[41] Metalclad Corp., Press Release (June 13, 2001).

[42] Emilio Agustin Maffezini V. The Kingdom of Spain, ICSID Case No: ARB/97, Decision of the Tribunal on Objects to Jurisdictions, 25 January (2000), 40 ILM 1129 (2001). (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163).

[43]Smutny, Abby Cohen (2003), "State Responsibility and Attribution When is a State Responsible for the Acts of State Enterprises? *Emilio Agustin Maffezini V. The Kingdom of Spain" ed* Weiler, Todd

environmental impact assessment (EIA) was required. The government approved the EIA several month later, but required that various changes be implemented that increased the costs to the project.[44] While these preparations for the implementation of the project were in progress, EAMSA began to experience financial difficulties. A transfer of 30 million Spanish Pesetas was made from a personal account of Mr. Maffezini to EAMSA.[45]

In early March 1992, Mr. Maffezini ordered the construction to stop and the dismissal of EAMSA employees. In June 1994 an attorney working for Mr. Maffezini approached SODIGA with an offer inviting it to cancel all outstanding debts owed it by EAMSA and Mr. Maffezini in exchange for EAMSA's assets. SODIGA indicated that it would accept this offer provided Mr. Maffezini was willing to add 2 million Spanish Pesetas. This proposal was rejected by Mr. Maffezini. Later SODIGA indicated that it was willing to accept the original proposal made by Mr. Maffezini's attorney. Mr. Maffezini did not accept SODIGA's latest proposal.[46]

Mr. Maffezini claimed that he suffered loosed in regard to his investment and that his project failed because SODIGA had provided poor advice with regard to project costs. He has submitted following four main contentions to this Tribunal:[47]

1. Because of SODIGA's status as a public entity, all of its acts and omissions are attributable to the Kingdom of Spain.
2. Project was failed because of the wrong advice given by SODIGA with regard to the costs of the project, which turned out to be significantly higher than originally estimated.
3. SODIGA was also responsible for the additional costs resulting from the EIA since EAMSA was pressured to make the investment before the EIA process was finalized and before its implications were known.

(2003), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London: Cameron May Ltd, p. 19.

[44] Ibid., p. 20.

[45] E. A. Maffezini Case (2000), supra 42, para 42.

[46] Ibid., para. 43.

[47] Ibid., para. 44.

4. Mr. Maffezini had not agreed to a loan to EAMSA for 30 million Spanish Pesetas and that the transfer of this amount from his personal account to EAMSA was irregular.

In response to first claim, as status of SODIGA as public entity, the Tribunal first examined its nature.[48] The Tribunal observed that SODIGA, a public entities from an economic point of view governed by private law, not defined as an administrative agency as a matter of Spanish law. As the structural test thus was indeterminate, the Tribunal considered other factors. According to the Tribunal:

> The structural test..... is but one element to be taken into account. Other elements to which international law looks are, in particular, the control of the company by the State or State entities and the objectives and functions for which the company was created.[49]

The Tribunal therefore applied what it referred to as "the functional test" that is: whether specific acts or omissions are essentially commercial rather than governmental in nature or, conversely, whether their nature is essentially governmental rather than commercial.[50] On the question whether SODIGA acted in a commercial or governmental capacity in regard to Mr. Maffezini's investment, Tribunal held:

> At the time EAMSA was established, SODIGA was in the process of transforming itself from a State-oriented to a market-oriented entity. While originally a number of SODIGA's functions were closer to being governmental in nature, they must today be considered commercial in nature. But at the time of transition, there was in fact a combination of both, some to be regarded as functions essentially governmental in nature and others essentially commercial in character.

The Tribunal therefore reviewed claims first, whether the claim involved acts taken by SODIGA in its public capacity or governmental in nature.[51]

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[48] Smutny, Abby Cohen (2003), supra note 43, p. 21. In examining the nature of SODIGA the Tribunal applied "structural" test and a "functional" test. These tests were designed to assess whether SODIGA was recognised as a "State entity". As SODIGA was established under and was regulated by laws of Spain, these laws were consulted to describe SODIGA's structure. But "structural test" did not establish as to whether SODIGA was a "State entity."

[49] E. A. Maffezini Case (2000), supra note 42, para 50.

[50] Ibid., para, 52.

[51] Ibid., para, 57.

With regard to ***second*** question the Tribunal held: it is apparent that SODIGA did more than merely provide EAMSA with information. Nevertheless, the Tribunal was confident that SODIGA "was not discharging any public functions" in providing that information assistance of EAMSA as many financial and commercial entities provide similar services to prospective customers.[52] With regard to ***third*** claim the Tribunal concluded that Mr. Maffezini either was or should have been fully aware of all EIA requirements and rejected that there was any political pressure by government placed on the project to proceed.[53] Furthermore, the Kingdom of Spain's action is fully consistent with Article 2(1) of the Argentine-Spain Bilateral Investment Treaty, which calls for the promotion of investment in compliance with national legislation.[54] The Tribunal accordingly also dismisses this contention by the Claimant.

With regard to the forth question 'transfer of fund' both parties presented evidence as to whether the arranged for the transfer of funds was acting for SODIGA or his personal capacity. Tribunal considered that although Mr. Maffezini several months earlier had informed the individual (Mr. Soto Baños) that he was willing to make such funds available to EAMSA as a loan but immediately prior to effecting the specific transfer, he consulted only the President of SODIGA for approval and did not with Mr. Maffezini, although there was time to do so. Accordingly the Tribunal concluded that individual was an employee of SODIGA so for his act SODIGA were responsible.[55]

It must also be asked whether that action is purely commercial in nature or whether it was performed in the exercise of SODIGA's public or government functions. In the regard the Tribunal considered 'the public functions of SODIGA acquire special relevance:

> "SODIGA was an entity charged with the implementation of governmental policies relating to industrial promotion.[56] So the acts of SODIGA relating to the loan cannot be considered commercial in nature and involve its public functions, responsibility for them should be attributed to the Kingdom of Spain. In particular, these acts

[52] Ibid., para. 62.

[53] Smutny, Abby Cohen (2003), supra note 43, p. 25.

[54] E. A. Maffezini Case (2000), supra 42, para. 71.

[55] Ibid., para. 76.

[56] Ibid., para. 78.

amounted to a breach by Spain of its obligation to protect the investment as provided for in Article 3(1) of the Argentine-Spain Bilateral Investment Treaty. Moreover, the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1) of the same treaty. Accordingly, the Tribunal finds that, with regard to this contention, the Claimant has substantiated his claim and is entitled to compensation."[57]

In this way Tribunal held that the Kingdom of Spain is responsible for the act of his state enterprises and pay the Claimant the amount of ESP 57,641,265.28

The ICSID, specialised tribunals, was established for the purpose to which TNCs could have access, and before which TNCs could be brought. It would assist in handling the majority of cases involving the global activities of TNCs without the need for the ICJ to be involved. For jurisdiction to submit a dispute, either the specific consent of a states or such a clause in a contract, concession agreement or other investment agreement is necessary. Arbitration under the auspices of ICSID is 'truly denationalised'. Since national law is entirely excluded and state parties are obliged to comply with the award of the tribunal, subject only to the provisions for appeal to an annulment Committee appointed by ICSID itself. By allowing TNCs and other foreign private investor to make claims in their own name against states, ICSID and such other dispute mechanism has the potential for fundamental transformation in international law and such system provides the strength to TNCs and such other business entities.

4.3 The Alien Tort Statute: Enforcement of International Law through US Law

The Alien Tort Statute (ATS), as part of the Judiciary Act of 1789, is the first U.S. law which not only make liable to State actors but also applies to private actors. ATS[58] provides:

> "The district courts shall have jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Thus, there are two alternatives under ATS: (a) a violation of the law of nations or (b) a violation of a treaty of the United States. Under the **first** alternative, three

[57] Ibid., para. 83

[58] The Alien Tort Statute or The Alien Tort Claim Act, codified in 28 U.S.C. § 1350,

requirements must be met: (a) an alien, (b) a tort, (c) and a breach of customary international law. In **second** alternative also, three requirements must be fulfil: (a) an alien, (b) a tort, (c) and a violation of a treaty of the United States. The litigation under ATS in which (foreign) victims of human rights abuses, sometimes with the support of human rights activists, filed cases against TNCs.

The modern era history of the ATS begins in 1980 with *Filártiga v. Peña-Irala*. After *Sosa case* approximately half of the ATS cases involve TNCs defendants. The reason of litigation on large amount is that on the international plane, the regulatory response to TNC activity has been largely ineffective or even absent. TNCs do not belong to the subjects of international law. Neither international treaties nor customary international law directly impose legal obligations on TNCs. Accordingly, any obligations including human rights are not binding on TNCs. So domestic law and local court are the only mechanism to protect and provide remedies to victim against TNCs abuses of human rights and other field like labour, environment etc. The effectiveness of domestic laws is another question but they provide remedy to some extent. In this context ATS is the one of that crucial law.

Doe vs. Unocal Corporation (1997)[59]:

International treaties and conventions have consistently condemned human rights abuses and international arbitration of those abuses has seldom led to punishment.[60] International tribunal are not always the best or most practical forum for combating human rights violations. International adjudication often requires a long and drawn out process, and judgements against guilty parties are difficult to enforce[61]. Therefore, generally party turn to national courts for justice at the domestic

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[59] *Doe vs. Unocal Corporation* (1997), 963 F, Supp. 880, 883, 884 (C.D. Cal. 1997).

[60] U.N. SCOR, 48TH Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993) (deciding to "establish an international tribunal for ..... prosecuting persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia") (U.N. SCOR, 49TH Sess., 3453 d mtg. at 2, U.N. Doc. S/RES/955 (1944) tribunal for Rwanda).

[61] Henkin, Louis (1979), *How Nations Behave: Law and Foreign Policy*, Columbia: Columbia University Press, p. 27.

level. In this prospective, the U.S. ATCA law is useful to provides the remedies to aliens.[62]

Doe vs Unocal Corporation, one prominent case involving a TNC, which involved claims of forced labor in the construction of a natural gas pipelines 'named as Yadana pipeline' in Myanmar. Construction of pipeline was under joint venture by Unocal with the military government of Myanmar. In 1988, the ruling military elite in Burma came into power and created the State Law and order Restoration Council (SLORC). Upon taking control of Barma, SLORC imposed martial law and renamed the country Myanmar. As the new Burmese government, SLORC entered into a joint venture project to construct a gas pipe line through the Tenasserim region in barma. Alleging that the Burmese government and its agent committed human rights violations during the construction of the gas pipeline, Burmese citizens turned to the U.S. court and filed a claim in the Central District of California.

The Unocal Court outlines its approach to the ATCA claims as a three-step test[63]:

> 'To state a claim under the ATC, a plaintiff must allege (1) a claim by an alien, (2) alleging a tort, and (3) a violation of the law of nations (international law). The parties do not dispute that the first two elements are satisfied. The issue is whether the conduct of the Myanmar military violated international law, and if so, whether Unocal is liable for these violations'.

In the court's opinion, the Burmese plaintiffs had not presented sufficient evidence to establish liability on the part of Unocal for SLORC's actions, and as a matter of law, Unocal was entitled to summary judgement. The court acknowledged that Unocal was aware that the Burmese military violated international law by using forced labor in conjunction with the pipeline project.[64] However, plaintiffs failed to present any facts to suggest that Unocal sought to employ forced labor. The court held that "to prevail on their ATCA claim against Unocal, Plaintiffs must establish that Unocal is legally responsible for the Myanmar military's forced labor practices."[65]

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[62]Toole, Terese M. O (1988), "*Amerada Hess Shipping Corp. v. Argentine Republic*: An Alien Tort Statute Exception to Foreign Sovereign Immunity" *72 MINN. L. REV., pp. 829-858, p. 839.*

[63] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000), p. 1303.

[64] Ibid., p. 1310.

[65] Ibid., p. 1308-1309.

The three-judge panel, of the Court of Appeal for ninth circuit, found the case actionable under ATCA and reversed the Circuit courts 'grant of summary judgement in favour of Unocal on claims for forced labour, murder and rape'.[66] The majority disagreed with the lower court's finding that no evidence suggested that Unocal could be held accountable for the actions of the Burmese military under the ATCA.[67] The majority cited *Kadic v. Karadii6,* in which the court found that certain crimes, such as rape, torture and summary execution do not need to be committed under "color of law" if done so in the furtherance of other more heinous crimes, such as slave trading, genocide, or war crimes.[68] These crimes, known as '*jus cogens* crimes', are so egregious that they violate the law of nations regardless of whether they are committed under "colour of law."[69] It was found that the alleged acts were actionable under ATCA without the existence of the state action requirement. Thus the court held that Unocal could ultimately be liable for the alleged human rights violations.

The next step for the *Doe v. Unocal* state case was to empanel a jury to hear the case. However, before this began, Unocal and the plaintiffs reached an out-of-court settlement. In a joint-announcement made on December 14, 2004, Unocal and Earth Rights International a HR group representing the Burmese plaintiffs, announced that they had a reached a settlement that would end both the state and federal cases against Unocal. Although this ruling is not legal precedent, it suggests that the Alien Tort Claims Act is a promising avenue for holding corporations liable for international human rights violations.

The important ramification of the judgement is that a private company may now be held liable for violations of international human rights committed by it or other entities associated with it. This decision will likely have a substantial impact on both foreign investment and foreign presence in areas of the world that are known to be replete with human rights abuses. It may also prompt U.S. corporations to demand cessation of human rights violations in countries where they operate. The court took the greatest step possible in the right direction under the particular facts. The court

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[66] Unocal III, 395 F. 3d 932 (9th Cir. 2002).

[67] Ibid., p. 947.

[68] Ibid., p. 945-46 (citing *Kadic v. Karadi* 6, 70 F.3d 232, 242-43 (2d Cir. 1995)).

[69] *Kadic v. Karadi, 6,* 70 F.3d 232, 242-43 (2d Cir. 1995).

applied ATCA standards and the state action requirement consistent with current case law and created a new standard by which corporations should evaluate investment risks.

Wiwa vs.Royal Dutch Petroleum Co. (2000)[70]

The Wiwa cases relate to the US Alien Tort Claims Act (ATCA) are important and considered as landmark cases. U.S. courts have traditionally been reluctant to exercise jurisdiction over human rights violations committed abroad against foreign persons, often invoking *'forum non conveniens'* to dismiss the cases. The Second Circuit's ruling in this case altered the balance of forum non conveniens, making it easier to bring claims based on a foreign human rights violation despite the availability of an alternative forum.[71]The Wiwa cases were associated with environmental devastation, but were not directly instituted by virtue of environmental devastation. The defendants were sued for human rights violations such as torture; cruel, inhuman and degrading treatment; summary execution; arbitrary arrest and detention; and crimes against humanity.[72] Environmental devastation is only the indirect cause of these cases.

Shell Petroleum, N.V., formerly the Royal Dutch Petroleum Company, began oil production in the Niger Delta region of Nigeria in 1958. The operation of Shell's oil production devastated the local environment. Nine environmental and human rights activists led a movement in protest of Shell's egregious behaviour. This movement was suppressed relentlessly by the Nigerian government at the request of Shell and with Shell's assistance and financing. On 10 November 1995 nine Ogoni leaders were executed by the Nigerian government after being falsely accused of murder and tried by a specially created military tribunal.

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[70] *Wiwa v Royal Dutch Petroleum Co.* 226 F. 3d 88 (2d Cir. 2000) Other material related with the case: (http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum)

[71]Fellmeth, Aaron Xavier (2002), "Wiwa vs. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts", *Yale Human Rights and Development Law Journal,* (2002) Vol.5, pp. 241-254, p.241.

[72]Han, Xiuli (2010), "The Wiwa Cases", *Chinese Journal of International Law*, Volume 9, Issue 2, pp. 433-449, p. 434.

On 8 November 1996, the case was brought against Royal Dutch Petroleum Company and Shell Transport and Trading Company who supported the 1995 executions of the Ogoni Nine. The case was brought under the ATCA and the Torture Victim Protection Act.[73] The defendants, then, filed their motion to dismiss the case on the ground of *forum non conveniens*. On 25 September 1998, Judge Kimba Wood of the District Court (SDNY) dismissed the case and determined that England would be an alternative and better forum in which to adjudicate the case.[74]

On 5 March 2001, the plaintiffs sued Brian Anderson, the former Managing Director of the Royal Dutch/Shell subsidiary in Nigeria and complained that Shell encouraged Nigerian government officials to commit imprisonment, torture and kill plaintiffs and gave the Nigerian military money, weapons, vehicles, ammunition, and other logistical support in the village raids. On 22 February 2002, Judge Wood held that the plaintiffs were entitled to bring their actions to court under the ATCA, TVPA and Racketeer Influenced and Corrupt Organizations Act (RICO).[75] The court confirmed that the actions of Royal Dutch/Shell and Anderson constituted participation in alleged crime. Judge Wood's opinion found that the plaintiffs' allegations met the requirements for claims under the ATCA.

Since 1996, three lawsuits have been brought based on the Ogoni Nine atrocity: Wiwa v. Royal Dutch/Shell (1996), Wiwa v. Anderson (2001) and Wiwa v. Shell Nigeria (2004) (collectively referred as Wiwa v. Shell). On 3 June 2009, as mentioned earlier, the Second Circuit Court of Appeals in New York overturned the District Court decision of dismissal and ordered jurisdictional discovery against Shell Petroleum Development Company of Nigeria.[76]

Just three days later of appellate court decision, the parties agreed to a settlement for all three lawsuits. Shall agreed to pay US $ 15.5 million in

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[73] Torture Victim Protection Act (28 U.S.C. §1350 Appendix) allows for the filing of civil suits in the United and States against individuals who, acting in an official capacity for any foreign nation, committed torture and/or extrajudicial killing.

[74] Order of Judge Wood on 96 Civ. 8386 (KMW)(HBP)on 25 September 1998 Source: Centre for Constitutional Rights (http://ccrjustice.org/files/9.25.98%20Judge%20Wood's%20Order.pdf)

[75] Han, Xiuli (2010), supra note 72, p. 436.

[76] *Wiwa v. Shell Petroleum Dev. Co. of Nigeria,* 2009 WL 1560197 (2d Cir., 3 June 2009).

compensation and legal costs to the families of Saro-Wiwa and the eight other executed Ogoni leaders.[77]

Though there are significant difficulties with bringing environmental cases to US courts under the ATCA, the Wiwa cases are important and represent a significant victory for the victims of environmental and human rights violations. Because the US courts can help the plaintiffs obtain a remedy from TNCs and thus punish TNCs located in foreign countries for human rights violations by the exercise of jurisdiction.[78] The Wiwa cases and the ATCA can discourage companies from destroying the local environment and exploiting human rights abuses for their own profit.

The significance of these cases to ATCA jurisprudence is very limited because they are not cases involving environmental issues directly. Therefore they did not give any direction on whether a tort caused by environmental destruction can constitute the cause of action for ATCA lawsuits and there are not any conclusions that confirm the illegality of Shell's environmental destruction and human rights violation. Therefore, the ATCA case cannot develop too much under the existing international environmental law framework.[79] On international level there need an international corporate court which can settle such kind of dispute and provide the remedy to victim and protect the environment.

4.4 Corporate Case in India

Bhopal Gas Tragedy[80]

Bhopal Gas Tragedy, 'A Case of corporate manslaughter' was the worst industrial disaster on record occurred in Bhopal. Pollution is caused primarily by the affluent. It falls under the organic chemical industrial disasters. The Bhopal gas leak is the largest chemical industrial accident.[81] An estimated 520,000 persons were

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[77] *Wiwa v. Shell S.D.N.Y.*, Settlement Agreement and Mutual Release (8 june 2009).

[78] Han, Xiuli (2010), supra note 72, p. 449.

[79] Han, Xiuli (2010), supra note 72, p. 449

[80] *Union Carbide Corporation vs Union Of India*, 1990 AIR 273, 1989 SCC (2) 540.

[81] Dinham, Barbara and Satinath, sarangi (2002), "The Bhopal Gas Tragedy 1984 to? The evasion of Corporate Responsibility", *Environment and Urbanization,* April Vol 14, No 1, PP. 89-99, p. 89.

exposed to the gases, and up to 8000 death occurred during the first week.[82] Other government agencies estimate 15,000 deaths. A government affidavit in 2006 stated the leak caused 558,125 injuries including temporary partially and permanently disabling injuries.

Union Carbide's operations in India go back to 1924, when the Union Carbide Corporations (UCC), a US based company opened an assembly plant for batteries in Calcutta. In 1983, UCC had 14 plants in India producing chemicals pesticides, batteries and other products. UCC operations in India were conducted through Union Carbide India Limited (UCIL). UCC held 50.9% of UCIL stock and remaining 49.1% was owned by various Indian investors.[83] In October 1982, a mixture of MIC chloroform and hydrochloric acid escaped from the Bhopal plant, endangering the neighbouring community and injuring a few workers. This was a warning which made it clear of potential public risks. But for safety precautions there was no action taken. At about 11 p.m. on December 2, 1984 the pressure in tank No. 610 started building up. 41 tons of MIC gas in this tank, burst from a gas scrubber and leaked into atmosphere between 12.45 a.m. to 1.30 a.m. on December 3, 1984. The clouds of gas dispersed across the plant ground and in the morning the toxic bog enveloped most of the area in and around Bhopal. No alarm ever sounded a warning and no evacuation plan was prepared.[84] This was indeed the 'Hiroshima' of Chemical Industry.

Shortly after the disaster, victims and their relatives began to seek recovery from UCC in US courts. On February 6, 1985, the litigation has been filed in Southern District of New York. A consolidated complaint was filed in that court on June 28, 1985. In March 1985, the government of India passed the Bhopal Gas Leak Disaster (Processing of Claims) Act. The Bhopal Act granted the government of India exclusive rights to represent victims of the disaster, both in India and abroad. The Bhopal case was dismissed from U.S. courts by Judge John Keenan on May 12, 1986, on the grounds of *forum non conveniens.* This legal doctrine speculates that

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[82]Ingrid Eckerman (2005), *The Bhopal Saga: Causes and Consequences of the World Largest Industrial Disaster*, Hyderabad: University Press, p.5.

[83]Khanna, B.K (2005), *All You Wanted To Know About Disasters*, New Delhi: New India Publishing Agency, p. 156.

[84] Ibid., p. 157.

significant decisions leading to the case were made elsewhere, making it inconvenient to secure witnesses and evidence in the proposed forum.[85] Judge Keenan concluded that "it would have been sadly paternalistic, for his court to evaluate the operation of a foreign country's laws....to deprive the Indian judiciary this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged."[86]

In September 1986, the Indian government filed suit against Union Carbide in Bhopal District Court[87]. Independently of that action, in November 1987, CBI filed criminal charges against, among others, UCIL, Union Carbide, and Warren Anderson, alleging culpable homicide, grievous hurt, and causing death by use of a dangerous instrumentality. On 4th April, 1988, the Madhya Pradesh High Court modified the interlocutory order dated 17.12.1987 made by the District Judge and granted interim compensation of Rs.250 Crores.[88] Both the Union of India and the Union Carbide Corporation have appealed to this Court against that order.

Litigation in the civil suit proceeded for more than two years, during the course of which jurisdiction passed to the Supreme Court of India under Article 142(1) of Constitution of Indian. The Court issued two orders, one dated February 14, 1989, and other next day which evoked the settlement agreement among the parties. The February 14, 1989 settlement order required union carbide to pay $470 million to the Indian government in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal gas disaster and stated that all civil proceedings related to the disaster "shall stand concluded in terms of the settlement."[89] The February 15, 1989 settlement order reduced Union Carbide's share of the liability by $45 million to $425 million and required UCIL, instead, to pay that $45 million. On May 4, 1989 the Court pronounced its reasons for its aforesaid order:

> "The statement of the reasons is not made with any sense of finality as to the infallibility of the decision; but with an open mind to be able to appreciate any

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[85]Fortun, Kim (2001), *Advocacy after Bhopal: Environmentalism, Disaster, New Global Orders*, Chicago: The University of Chicago Press, p. 25.

[86]Ibid., p. 25.

[87]The case started in District Court at Bhopal in Suit No. 113 of 1986.

[88]Union Carbide Corporation vs. Union of India Etc, 1990 AIR 273, 1989 SC (2) 540, p. 542.

[89]Union Carbide Corporation vs. Union Of India, AIR 1990 SC 273, p. 275.

tenable and compelling legal or factual infirmities that may be brought out, calling for remedy in review under Article 137 of the Constitution."[90]

The basic reason for the settlement was the compelling need for urgent relief. The court considered it a compelling duty to secure immediate relief to the victims on judicial as well as humane basis. The points on which the Court proposed to set-out brief reasons are the following[91]:

1. How did this Court arrive at the sum of 470 million US dollars for an over-all settlement?
2. Why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable'?
3. Why did the Court not pronounce on certain important legal questions of far reaching importance said to arise in the appeals as to the principles of liability of monolithic, economically entrenched?

In response to first question the Court examined the prima facie material and all the circumstances including the prospect of delays inherent in the judicial process in India. Court also directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, would aggregate very nearly to 500 million US dollars which the learned Attorney General had suggested, be made the basis of the settlement. Both the parties accepted this direction.[92]

On second question as 'why did the Court consider this sum of 470 million US dollars as 'just, equitable and reasonable' the Court held that this is not independent of its quantification. The idea of reasonableness is necessarily a broad and general estimate in the context of a settlement of the dispute and not on the basis of an accurate assessment by adjudication. The question is how good or reasonable it is as a settlement, which would avoid delays, uncertainties and assure immediate payment:[93]

> Death has an inexorable finality about it. Human lives that have been lost were precious and in that sense priceless and invaluable. But the law can compensate the estate of a person whose life is lost by the wrongful act of another only in the way of the law is equipped to compensate i.e. by monetary compensations calculated on

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[90]Union Carbide Corporation vs. Union Of India, (1989)3SCC38, [1989]3SCR128, 1989(2) UJ285(SC), MANU/SC/0616/1989, para. 4

[91] Ibid., para. 5.

[92] Ibid., para. 12.

[93] Ibid., para. 15.

certain well recognised principles. "Loss to the estate" which is the entitlement of the estate and the 'loss of dependency' estimated on the basis of capitalised present value awardable to the heirs and dependants are the main components in the computation of compensation in fatal accident actions.[94]

With regard to third question, court said that many problems emerging from the pursuit of such dangerous technologies for economic gains by multinationals arose in this case. It is said that this is an instance of lost opportunity to give the law the new direction on vital issues emerging from the increasing dimensions of the economic exploitation of developing countries by economic forces of the rich ones. The prospect of exploitation of cheap labour and of captive-markets induces multinationals to enter into the developing countries for such economic-exploitation.[95] This case needs a careful assessment of the legal and Constitutional safeguards stemming from these vital issues of great contemporary relevance. Associated problems of the adequacy of legal protection against such exploitative and hazardous industrial adventurism, and whether the citizens of the country are assured the protection of a legal system which could be said to be adequate in a comprehensive sense in such contexts arise.[96]

The case presents many socio-legal issues that are much different than those encountered in other industrial or environmental disasters. The accident is exceptional, not because of the high number of human causality or long term ill effects on the health of the residents of that area, but because this accident raised questions that were only dealt with marginally in international code of conduct for TNCs.[97] The fragmented nature of the current legal regime that regulates TNCs activity has failed thoroughly. No attempt has been made to question, comprehend, or analyze the enormity of the scope of the TNCs' activity from a world order perspective. A sense of global, human, social , economic, environmental and corporate justice is absent and there has no serious attempt has been made either in

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[94] Ibid., para. 23.

[95] Ibid., para. 31.

[96] Ibid., para. 32.

[97] Chopra, Sudhir K. (1994), "Multinational Corporations in the aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activities", *Valparaiso University Law Review*, Vol. 29, pp. 235-284, p.235.

national or international level to control these kind of situation that have emerged in the aftermath of Bhopal.[98]

Coca-Cola Case in Plachimada[99]

This case is prime example of corporate aggression over natural resources and the consequent denial of the rights of the people. It has also been portrayed as the fight against TNCs by a small section of the local population in order to protect their basic human rights, such as the right to drinking water and the right to livelihood. Plachimada, a small village in Kerala, became the centre of controversy after the Coca Cola Company set up a bottling plant there. The village became more famous (or infamous) after incidents of pollution and over extraction of groundwater by the Company, were reported by various organisations and the popular media.[100]

The Hindustan Coca Cola Company set up a plant in Plachimada village in Perumatty Panchayat in Chittoor Taluk in Palakkad district in the year 2000. The plant occupies an area of around 34 acres of land. The people of Plachimada started to suffer adversities within six months after the Company started its activities. It was reported that the salinity and hardness of the water had risen. The local people started their agitation against the Company within a year of the setting up of the Company's plant. **Mylamma**, a tribal woman, had organised the local community against the Company.[101] The allegation of the Plachimada people was that there was a decline of water level in the wells and a decline in the quality of groundwater. Due to this hue and cry the Perumatty Grama Panchayat passed a resolution on 7 April 2003:

> "As ground water is excessively exploited for the use of Hindustan Coca-Cola Beverages Bottling Plant run in Plachimada and as a result, acute drinking water scarcity is felt in Perumatty Grama Panchayat and nearby places, it was resolved by

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[98] Ibid., p.236.

[99] *Perumatty Grama Panchayat vs State of Kerala* (W.P. (C) No. 34292 of 2003)(2004 (1) KLT 731) on 16 December, 2003

[100] Koonan, Sujit (2007), "Legal Implications of Plachimada: A Case Study", *International Environmental Law Research Centre* (IELRC), International Environment House Working Paper – 05. (http://www.ielrc.org/content/w0705.pdf)

[101] Surendranath, C. (2004), "Coke vs. People: The Heat is On in Plachimada", *India Resource Centre*, April 14. (http://www.indiaresource.org/campaigns/coke/2004/heatison.html)

the Panchayat Committee on 7.4.2003, not to renew the licence of the said Company."[102]

The Panchayat derives its power from Article 243 read with 11th Schedule of Constitution of India and the Panchayat Raj Act, 1994. The reports, in September 2003, of the KGWD (Kerala Ground Water Department) and CGWB (Central Ground Water Board) concluded that the quality of groundwater in Plachimada does not require immediate governmental intervention. The KGWD report said that the water quality does '...not show an alarming result.'

The KGWD also report clearly mention that three wells out of the 20 examined reveals problems with the quality of water.[103] The CGWB report also contains similar observations, for instance: '...chemical constituent and EC of two wells have increased from 2890 to 4290 which are located in Vijayanagaram in the close vicinity of the plant.'[104] However, in the conclusion of both the reports, these observations (that three out of 20 wells were significantly polluted) were analysed as being negligible! The irresponsibility and the attitudes (biased in favour of the big TNCs) of the Kerala Government was very clear in another report jointly prepared by the KGWD and CGWB, and titled 'The Dynamic Ground Water Resources of Kerala as on March 2004'.

The Secretary of the Panchayat issued order, dated 15.5.2003, cancelling the licence granted to the company and directing him to stop production with effect from 17.5.2003. Company challenged this order before the high court. The court held that the 'order of the Panchayat to close down the unit on the finding of excessive extraction of ground water' is unauthorised.[105] The Panchayat has only right to say

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[102] *Perumatty Grama Panchayat* (2003), supra 99, para 2.

[103] Kerala Ground Water Department, Report on the Monitoring of Wells in and Around the Coca Cola Factory in Plachimada, Kannimari, Palakkad district (Kerala Ground Water Department, September, 2003).

[104] Central Ground Water Board (CGWB), A Report on the Groundwater Conditions in and Around Coca Cola Beverages Private Limited Company, Plachimada Village, Palakkad District, Kerala (Thiruvananthapuram: CGWB, 2003).

[105] *Perumatty Grama Panchayat* (2003), supra 99, para 12

that extraction of ground water will not be permitted and ask the Company to find out alternative sources for its water requirement.

The next point to be decided is whether the decision of the Panchayat that the Company should not be permitted to extract ground water is legal? Company's council submitted that "there is no law governing the control or use of ground water, The Kerala Ground Water (Control and Regulation) Act, 2002 has not so far been enforced. Company is free to exact any amount of ground water which is available underground in the land owned by it." On this question court observed that Ground water is a national wealth and it belongs to the entire society. Court also mentioned Principle 2 of Stockholm Declaration, 1972.[106] It is submitted as a good neighbour, it may have a moral obligation not to make excessive use of ground water, so as to affect the persons in the neighbourhood.

Court also gave a reference of *M.C. Mehta v. Kamal Nath*[107] where Apex Court has held that the "doctrine of public trust" is part of the Indian Law. Doctrine primarily rests on the principle that:

> "Certain resources like air sea waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes."[108]

The State as a trustee is under a legal duty to protect the natural resources. Therefore, court feels that the extraction of ground water is illegal. It has no legal right to extract this much of national wealth. The Panchayat and the State are bound to prevent it. The

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[106] Ibid., para. 13. Principle 2 of Stockholm Declaration, 1972 reads as "The natural resources of the earth, including the air, water, land, flora and fauna especially representative samples of natural eco systems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."

[107] *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388, para 24.

[108] Ibid., para. 24.

action taken by the Panchayat against the company to prevent extraction of ground water has to be upheld[109]:

1. The underground water belongs to the general public and company has no right to claim a huge share of it and the Government have no power to allow a private party to extract such a huge quantity of ground water, which is a national property.
2. If the company is permitted to draw such a huge quantity of ground water, then similar claims of other land owners will also have to be allowed. The same will result in drying up of the underground aqua-reservoirs.

Accordingly the court gave following crucial directions:[110]

1. The company shall stop drawing ground water for its use after one month from today.
2. The Panchayat and the State shall ensure that the company does not extract any ground water after the said time limit. This time is granted to enable the company to find out alternative sources of water.

Challenging this Judgement the Company filed an appeal. The division bench of High Court held that the order of the Panchayat to close down the unit on the finding of excessive extraction of ground water is unauthorised. The Panchayat has only power to say "no more extraction of ground water will be permitted and ask the Company to find out alternative sources for its water requirement."[111] A person has the right to extract water from his property, unless it is prohibited by a statute. Extraction thereof cannot be illegal.

Court also held that the learned Single Judge was himself in two minds about an absolute proposition that might have resulted. Observations in paragraph 14 of the judgment indicated that what was objectionable was a "right to claim a huge share of it" alone. Further, it has been observed in paragraph 15 that "like every other land owner, Company can also be permitted to draw ground water by digging wells, which must be equivalent to the water normally used for irrigating the crops in a 34 acre plot", but however, the right had been given to the Panchayat to fix the quantity

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[109] *Perumatty Grama Panchayat* (2003), supra 99, Para 13.

[110] Ibid., para 15.

[111] *Hindustan Coca Cola Beverages (P) Ltd. V. Perumatty Grama Panchayat* (2005) KLT 10, para. 32. http://www.thesouthasian.org/archives/2006/pdf_docs/HCJudgement_April05.pdf

permitted to be used. No reason is however given as to why agriculture has a priority than an industrial activity.[112]

The condition prescribed by the learned Single Judge, that the factory may be worked by bringing water from other, is impossible conditions which can lead only to one result viz., that the establishment is to be closed down. Court also observed that they also do not agree with the observation made in paragraph 13 of the said judgment that "even assuming the experts opine that the present level of consumption by the second respondent is harmless, the same should not be permitted". The reasons given in the judgment do not appeal to us as reasonable.[113]Panchayat has, in their letter dated 11.3.2004, offered to renew the licence on satisfaction of three conditions[114]. They are:

1. The company should not draw or cause to be drawn any ground water from anywhere in Perumatty Grama Panchayat, including the open well, and they may bring water from outside;
2. The company is to immediately stop discharge of waste, including dangerous and offensive contents, which are serious health hazards and attend to waste management; and
3. The products are to be ensured as not having any poisonous chemical substance in them, as has been found by the Joint Parliamentary Committee. Therefore, it was more of an ego clash, and we do not wish to go to other details.

As regards the **first** objection, court earlier held that such a restriction will be unwarranted. It always will be permissible for an occupier to draw water out of his holding. The permissible restrictions, in public interest, can only be to compel him to ensure that by his conduct he does not bring about a drought or any imbalance in the water level.[115] **Second** objection about pollution addressed through the Chairman of the Kerala State Pollution Control Board pointing out that every possibility of any waste product contamination has been plugged up.[116] On *third* objection viz., report

[112] Ibid., para. 36.

[113] Ibid., para. 40.

[114] Ibid., para. 48.

[115] Ibid., para. 49

[116] Ibid., para. 50.

from the Joint Parliamentary Committee, we had occasion to peruse through the documents as produced by the Panchayat. The Panchayat is therefore directed to consider the application for renewal of the licence granted to the Company, for the coming year, or any block years, if such application is filed within two weeks from today. The Company will have the obligation to apprise the Panchayat that they possess licences issued under the Panchayat that they possess licences issued under the Factories Act and clearance received from the Pollution Control Board.[117]

On 8 June 2010, 14-members high-power committee, comprising experts from various disciplines, had concluded that the soft drink company had caused multisectoral damage amounting to Rs.216.26 crore through operation of its plant and other actions and should be made to pay compensation to the affected people. Committee in its finding held that company had violated many Indian laws.[118] The committee had recommended constituting a tribunal under Article 323 B of the Constitution by the State or an authority under the Environment (Protection) Act by the central government to determine the compensation amount and ensure its enforcement.[119]

The discussion in the preceding case has highlighted the inadequacies of current international and multilateral efforts at regulating the conduct of TNCs. It has been seen how the voluntary nature of international regulatory initiatives translates into their non-observance by TNCs. It is therefore, safe to conclude that voluntary regulatory mechanisms are insufficient and ineffective in regulating the global conduct of TNCs. However, the international community has remained adamant in its refusal to formally recognize the need for binding international rules for corporate conduct. That attitude best finds support in the dominant notion in international law that TNCs lack international personality and are thus not subjects of international law.

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[117] Ibid., para. 52.

[118] These laws which company has violated includes the Water (Prevention and Control of Pollution) Act, the Environment (Protection) Act, the Factories Act, Hazardous Waste (Management and Handling) Rules, the SC and ST (Prevention of Atrocities) Act, Indian Penal Code, Land Utilization Order, the Kerala Ground Water (Control and Regulation) Act and Indian Easement Act.

[119] http://www.thehindu.com/todays-paper/article465701.ece

But emergent global realities are gradually chipping away at both the goal and normative foundation of this position. Human rights scholars, activists, and NGOs alike believe and argue passionately that international law ought properly to be applicable to private corporate actors. In other words, the relevant domain of international law should no longer be the community of nations, but rather 'the community of individuals in the human family. Hence some scholar argued that the corporation is a subject of international law and thus ought to bear duties under international law to observe international standards.

CHAPTER 5

CONCLUSION

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Transnational corporations (TNCs) are most important actors in the global economy, occupying a more powerful position than ever before. Sixty years ago, only a handful of TNCs existed. Now their numbers are tens of thousands. TNCs have a profound political, economic, social and cultural impact on countries, peoples and environments. Through their role in international trade and production, TNCs have played a major role in exploiting the weak bargaining position of developing countries to open up new opportunities for themselves at the cost of the people of host states.

TNCs are powerful, dominant and largely unaccountable, and their size often dwarfs the countries in which they operate. By their sheer power, the corporations appear to count a great deal more with government than do the views of the public who do not have such access to policymakers. Acting with little or no government control, TNCs have no effective responsibility to developing countries and its peoples. TNCs, therefore, can be highly detrimental to a poor country's political economic and social health. With the resource-poor peoples and communities are struggling for survival of their life. It is now hard to detect the absence of TNCs from any sizable area of economic activity that could possibly yield a profit. David Korten describes TNCs as "*instruments of a market tyranny that is extending its reach across the planet like a cancer, colonising ever more of the planet's living spaces, destroying livelihoods, displacing people, rendering democratic institutions impotent, and feeding on life in an insatiable quest for money. 'Market tyranny' effectively delivers developing countries into corporate hands.*"[1] To what extent this observation is true, but TNCs aren't problem themselves, they provide FDI and technology to developing countries for their development. The problem is how effectively regulating the activity of these gigantic entities.

[1] Korten, D. C. (1995), *When Corporations Rule the World*, London: Earthscan, p. 12.

TNCs have generally highlighted on their economic impact in terms of efficiency, profit maximization, capital flows and so on; but these entities overlooked the economic, social and cultural effects on the world's poor. The birth of the WTO in 1994 further strengthened the hands of TNCs. It means that governments are how less able to regulate and control them. Although the corporations have become more powerful, the UN has abandoned its attempt to frame a code of conduct to regulate them. The TNCs may claim that self-regulation can control the industry, but it has not stopped the abuse of power.

Investment by TNCs in developing countries is fundamentally different from investment by local companies. Dunning made an observation that TNCs directly control the deployment of resources in two or more countries, and the distribution of the resulting output.[2] They can use international experience, knowledge and muscle in a way that is not usually open to domestic firms. They are more likely to be able to exert market power. According to Sheila Page, "they are more likely to have experience in trading in markets outside the host country ... more likely to be aware of and experienced in exploiting the advantages of moving between exporting and investing abroad and therefore more likely to respond to new opportunities."[3] Countries are now competing to give foreign investors a 'favourable climate'. This usually means that TNCs regulation is weak in international as well as domestic levels. In practice the voluntary codes of conduct or self regulation concept is also not fruitful to meet corporate responsibility. Reginald Green rightly observed that "TNCs are incredible as social consciences, defenders of the poor, human value setters because their capacity and legitimacy for independent action in these areas is nil and such action contradicts their logic."[4]

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[2] Dunning, J. H. (1981), *International Production and the Multinational Enterprise,* London: Allen and Unwin, p. 7.

[3] Page, S. (1994), *How Developing Countries Trade,* London: Overseas Development Institute, p. 99.

[4] Green, R. H. (1983), "Transnational corporate responsibility and states, workers and poor people", *Churches and the Transnational Corporations*, Geneva: World Council of Churches, p. 110. Also, John Madeley (2008), *Big business poor people: How Transnational Corporations damage the world poor*, Londan: Zed Book, p. X.

TNCs are also different because they tend to make decisions in their head office and not in the countries where the subsidiaries operate. They are usually under no obligation to consult local people about their plans in the countries where they operate. An affiliate company of a TNC in a developing country may have little say over its own operation. On this issue Dunning points out:

> "Most decisions, the outcome of which affects the behaviour of foreign affiliates, are taken by their parent companies on the basis of information and expectations known only to them.'[5],

The decision depends on reality and reliability of information which they get. Second in what mechanism that information is collected, how the decision makers analysed that information and predict the situation of the host country also influenced the activity of subsidiary company.

TNCs have successfully developed the culture of consumerism and persuaded people in developing countries to adopt corporate products as part of their way of life. Some product and services make the life of individual more easy and comfortable. But some product which is either luxurious or harmful is advertised by corporation in such a way that these products attract common people that such goods cost a sizeable proportion of the poor's earnings. By consuming inappropriate products, the common and poor have less money to buy basic necessities. Maximum TNCs belongs to developed or western countries. By spreading the message 'West is best', TNCs tries to reduce the demand for locally produced goods and therefore damage local industries. The people of developing countries buy products of TNCs and work for the TNCs on terms that the corporations decide; they live in areas where TNCs operate. The people living near these polluted areas are affected by changes in the environment through the activities of these entities.

The question then arises as to why do the governments of poor and developing countries continue to attract them, if there is little or no net gain for most developing countries from the presence of TNCs? The basic reason is the mobilisation of resources in the face of poverty and enormous burden of external debt. External debt has been a major issue affecting developing countries since the beginning of the

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[5]Dunning, J. H. (1994), "Re-evaluating the benefits of foreign direct investment", *Transnational Corporations*, Vol. 3, No. 1 (February 1994), Geneva: UNCTAD, p.48.

1980s. Developing countries, having borrowed money in the 1970s at around a 10 per cent rate of interest – often for unwise, large-scale projects – found themselves in the 1980s having to repay at around 20 per cent. The total external debt of developing countries rose from 'US $9 billion in 1955 to US$572 billion in 1980 and to over US$2,000 billion in 1996'.[6] The money is owed to Western governments, governmental aid agencies, the IMF, the World Bank and other banks. By 2005, the poorest 149 countries had debts of US$2,700 billion.[7]

Governments of developing countries are in a dilemma. TNCs offer help to countries that have economic problems such as severe unemployment, chronic shortage of foreign exchange and sizeable foreign debts. The TNCs appear to be the engineers of wealth bringing in money and skills to earn additional foreign exchange and create jobs. They seem to be an almost magical answer to their problems. The problems that they bring may not be considered given pressing economic needs. This is however an illusion. But developing country governments are persuaded by Western governments and international financial institutions like IMF and World Bank that they have no option but to open their markets, embrace globalization and attract the TNCs.

The new concept of economic globalisation, liberalisation and privatisation (GLP) supports the spread of TNCs. Economic globalization - the world as a single market and without barriers, has become one of the controversial issues. Former US President Bill Clinton observed that '*Globalization is not a policy choice, it is a fact*'. This understanding suggests that countries have no choice, but to accept but globalization is widening the gap between the rich and the poor, leading to a more divided world.[8] UNCTAD *Trade and Development Report* has pointed to mounting evidence 'that rising inequalities are becoming more permanent features of the world

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[6] Gelinas, Jacques B. (1998), *Freedom from Debt*, London: Zed Books, p. 34.

[7] Jubilee Debt Campaign (2007), 'How big is the debt of developing countries?' <http://www.jubileedebtcampaign.org.uk> (accessed 23 January 2008).

[8] World Bank (1996), *Global Economic Prospects and the Developing Countries,* Washington, DC: World Bank.

economy'.[9] It is clear that the poorest developing countries are not developing. According to the United Nations Development Programme's *Human Development Report 2003*, 'more than 50 nations grew poorer in the last decade'.[10] 'A new face of "apartheid" seems to be spreading across the globe', says a UNICEF paper, 'as millions of people live in wretched conditions side-by-side with those who enjoy unprecedented prosperity.'[11]

Developing countries do not necessarily 'want' the TNCs. In an economic world order where western countries control the purse strings, and where the purses of many developing countries are empty, the west and the international agencies have effectively cornered poor countries into submission – ever so diplomatically, of course. Using its economic power, the west has used poverty in the developing world to force through its own ideological, free-market agenda. Liberalization and privatization took off in the 1980s with the advent of World Bank/IMF structural adjustment programmes and have been further advanced by the World Trade Organization and the TNCs. The escalation of globalization in the 1990s and the 2000s has had a huge impact on the poor. Millions of people are now worse off than in 1980. Globalization has helped the traders, the TNCs, but not the economies of developing countries.

The effects of TNCs in international regime could not be underestimated and no one can imagine a world without TNCs. So the real question is: how the activity and behaviour of TNCs can be regulated and second how to protect the local communities and environment from the TNCs and from their uncontrolled exploitation of natural as well as human resource, and how make them socially and environmentally responsible. Several suggestions have been recommended by different scholars on national and international level.

First is the concept of corporate social responsibilities (CSR). This concept is the based on the self regulation and auto limitation. On the basis of this concept TNCs have made Codes of conduct for self regulation. They legitimise their activities to prove that they are

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[9]United Nations Conference on Trade and Development (1997), *Trade and Development Report 1997*, Geneva: UNCTAD.

[10] United Nations Development Programme (2003), *Human Development Report 2003*. New York: UNDP.

[11] UNICEF staff working papers (2000), No. EPP-00-00, January, New York: UNICEF, 2000

socially and environmentally responsible. For this they provide small amounts of money to create roads, school and such other infrastructure for the benefit of the local community.

The problem with CSR principle is that TNCs are not accountable if they do not fulfil or obey the norm or conditionality of their own codes of conduct. The other person or local community cannot bring legal suits and get remedies on this basis. Same problems or weakness exists in different international instruments which have been created or drafted for the regulation of TNCs and their activities. These international instruments i.e. codes of conduct, guidelines, norms are not legally binding and voluntary in nature. So obedience and compliance depends on the desire of TNCs to follow these norms or conditionality. There is a pressing need for stronger mechanisms at the international level to build a counterweight to corporate power.

Scholars from the third world demand that there be a ***'binding international legal instrument'*** which applies to all TNCs without discrimination whether they belong to first world or third world. This instrument can also provide remedies to victims of TNCs. Nation states will and should remain primarily responsible for regulating corporate behaviour. But national governments are often too weak, too desperate for foreign investment, or too dependent on corporate campaign contributions to hold global firms accountable for their crimes. Different countries have different laws and sometimes these laws are insufficient to provide remedy or remedy given by TNCs is less in comparison to the injury. The remedies are often different in different countries for the same injury yet developed world is reluctant to develop a binding international legal instrument.

In domestic law a corporation is a legal person and it has rights and duties recognised by law. Another aspect of legal personality is the right to sue and be sued. But in international law, TNCs have no legal personality and they are governed by the laws of host country. From the oppressed class perspective, the recognition of the TNCs as 'international legal person' is valuable because generally the state, not TNC, is responsible for any default or violation of law or international obligation. The other benefit of treating TNCs as an international legal person is that can be responsible towards States and local communities. The real benefit of recognition of TNC as an international legal person goes to local community or Transnational Oppressed Class (TOC) only if they have right to sue TNCs not only in domestic court but also in different international court or international organisation. The home country of TNCs always favours the TNCs and due to pressure of international economic institution i.e. IMF, World Bank the host country are unable to control the illegal behaviour of TNCs.

International legal personality will make them directly responsible for their default or crime, if such a provision is made in international legal instrument.

For regulation, control and monitoring the activities of TNCs two international institutions are needed. ***First*** is an international institution like the former United Nations Centre on Transnational Corporations (UNCTC). As part of the reorganization of the economic sector of the UN, the UNCTC was dissolved in 1993 and the Programme on TNCs was transferred to UNCTAD where it does not play an effective role. Therefore a new organisation must be created to solely focus on the activity and behaviour of TNCs. It should be required to report to other international organisation such as ILO, WHO, UNESCO, UNICEF, ECOSOC, UN HRC etc.

Second like the International Criminal Court, a separate court should be established for corporations that could hand down real punishment on corporate crimes and illegal exploitation of natural as well as human resources. One important precedent at the international level is the mechanism for handling investment disputes. In the same way as a private foreign investor can sue a government in an international tribunal over the loss of a contract or a new environmental law that reduces their profits individuals and peoples of host states should also have the right to sue TNCs for wrong done. In conclusion socially responsible TNCs could make a good world where irresponsible TNCs has capacity to destroy the world.

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